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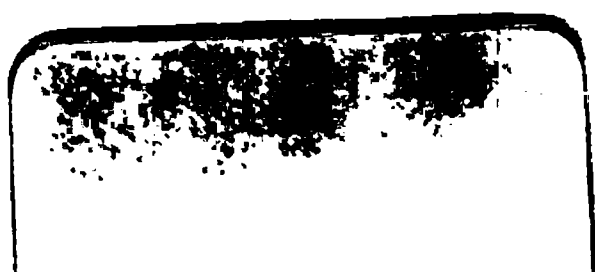
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1866.**

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISES ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

VOL. LXXXVI.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1887.

121786

JUL 29 1942

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AMERICAN DECISIONS.
VOL LXXXVI

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

**JOHNSON v. PROVINCIAL INSURANCE COMPANY OF
TORONTO.**

[12 MICHIGAN, 216.]

SCIRE FACIAS WILL LIE TO RECOVER FOR NEWLY DISCOVERED BREACH OF AGENT'S BOND, WHICH HAD PASSED INTO JUDGMENT, where the bond was given by the agent to secure his accounting and payment of sums collected by him to an insurance company in whose employ he was. The company had no means of discovering that the agent had received the money at the time of the rendition of the former judgment; and the fraudulent concealment, upon its discovery, constituted a new breach, and such concealment is a sufficient reason for not including the sum in the original pleading and judgment.

WRIT IS PROPERLY SAID TO RUN IN NAME OF PERSON OR GOVERNMENT from whom the command on the face of the writ appears to emanate.

OBJECTION TO WRIT, THAT IT IS NOT TESTED IN NAME OF PEOPLE, WILL NOT BE ALLOWED as an objection that the style of the writ was not in the name of the people, or that it did not run in their name. The courts will not permit the amendment of an objection which is purely technical, and which, as amended, would tend to overthrow substantial justice.

In July, 1858, defendants in error commenced an action against R. M. Chittendon as principal, and Johnson and Andrews as sureties, upon a bond given by them conditioned that Chittendon should properly account for and pay over to defendants in error all sums of money which he collected as their agent. In September, 1858, the company recovered a judgment for \$2,000, the penalty of the bond, and had their damages assessed at \$565. In November, 1859, *scire facias* was issued upon this judgment. It was entitled "The People

of the State of Michigan to the Sheriff of the County of Wayne, Greeting." The writ then proceeds to recite the recovery of the judgment above mentioned, that execution was issued against Chittendon, Johnson, and Andrews for \$565 and costs. It then recites the bond, with its conditions, and also the proceedings leading up to the former judgment. Then, as a new breach of this bond, it was alleged that, previous to the commencement of the action and the rendition of judgment therein, Chittendon had received on their account and as their agent \$302, which he had since been requested to pay back, but that he had refused to do so; that at the time of the rendition of their former judgment, defendants in error had no knowledge that Chittendon had received this money or any part thereof, that he had denied having received the said sum, and had wrongfully concealed the fact of its receipt from the company. The writ then commanded Chittendon and Johnson (Andrews being dead) to appear and show cause why judgment should not be recovered against them for this sum. It was then tested in the name of the circuit judge.

Moore, for the defendant in error.

Holbrook, for the plaintiff in error.

By Court, CAMPBELL, J. The judgment below was rendered on a *scire facias*, to recover upon further breaches of a bond which had passed into judgment against Roderick M. Chittendon as principal, and Hiram R. Johnson and Hiram R. Andrews as sureties. The bond was given for the purpose of securing the insurance company against the misconduct of their agent. Judgment was given on demurrer.

It was alleged as error that the breach set forth in the *scire facias* is the same, or a part of the same, set forth in the original declaration. The *scire facias* avers that the money now claimed was received by Chittendon before the original suit, but that he concealed that fact from the company, and that they knew nothing of it when the judgment was rendered.

The bond was given to secure an accounting as well as payment; and this was necessary, for the obvious reason that, generally, an insurance company has no means of discovering the receipt of money until the agent informs his principal of the fact. An agent cannot be permitted to set up his own wrong to avoid a liability; and if he kept the company in ignorance of his receipts, he cannot, on that ground, object that they

have not acted as if they knew what they did not know. Our statute makes a fraudulent concealment of a cause of action a ground for excepting it from the statute of limitations: Comp. Laws, sec. 5372; and if it avails for such a purpose, it must equally avail in a case like the present. The *scire facias* avers that it is a new breach, and gives the fraudulent concealment as a sufficient reason for not including it in the original pleadings and judgment.

It is also objected that the *scire facias* is not tested in the name of the people of the state of Michigan. It does run in the name of the people of the state of Michigan, and conforms in this regard to the English practice, and that of the United States courts, and probably most of the state courts. A writ is properly said to run in the name of the person or government from whom the command on the face of the writ appears to emanate.

Had not the words "in the name of the people of the state of Michigan" been inserted in the constitution between inverted commas, so as to favor the idea that the phrase must be used *verbatim*, no difficulty could arise in this case about it. Whether the constitution can be satisfied by a substantial compliance, has been left unnecessary for decision in the case before us, as the objection, which is purely technical, is itself insufficiently taken. The constitution does not require writs to be tested in the name of the people. The statute requires them to be tested in the name of the circuit judge. It is the style of the writ which must be in the name of the people: Comp. Laws, sec. 4107. As the statute is express upon this subject, the defendant in error was justified in assuming that the objection, being pointed at the test of the writ, was not well taken. We are reluctant to allow a party to lose a ground of error which we can see he probably designed to take merely because of a slip in misapplying a technical phrase; but the objection itself is so technical that we should not feel justified in allowing such an amendment as would rectify the slip to the overthrow of substantial justice.

The other grounds of error were not pressed.

Judgment must be affirmed, with costs.

The other justices concurred.

AS GENERAL RULE, JUDGMENT OF COURT OF COMPETENT JURISDICTION IS CONCLUSIVE, not only as to the subject-matter actually determined, but as to all other matters which the parties might have litigated and have had de-

cided in the cause: *Embury v. Conner*, 53 Am. Dec. 325; *Ellis v. Clarke*, 70 Id. 603. So, an entire demand cannot be split up so as to authorize the bringing of several suits thereon; in all such cases the judgment in the first action in which a part of the demand was put in suit can be pleaded in bar to any subsequent action in the same transaction: *Bendernagle v. Cocks*, 32 Id. 448; *Beach v. Crain*, 49 Id. 369, and notes. But the question of a concealment of part of plaintiff's cause of action does not enter into the consideration of these cases.

GARD v. STEVENS.

[12 MICHIGAN, 292.]

NOT CONTINUING GUARANTY. — A continuing guaranty is not given by a letter which says: "If you will let the bearer have what leather he wants, and charge the same to himself, I will see that you will have your pay in a reasonable length of time." Its operation is limited to a single purchase or transaction.

APPLICATION OF PAYMENTS. — Where a merchant sells goods to a customer under a guaranty from a third person that they will be paid for, and afterwards sells him other goods, the first money he receives from the purchaser should be applied to the payment of the goods covered by the guaranty.

CONTINUING GUARANTY — PRESUMPTIONS AS TO. — Unless one becomes surety for another, without limitation as to time or amount, in express terms or by clear implication, the court will not presume such an intention on his part.

WHEN CASE IS MADE FOR REVIEW OF BOTH LAW AND FACTS, IT IS NOT NECESSARY THAT CASE SHOULD STATE that it contains all the evidence, as this will be presumed, unless the contrary appears on the face of the case itself.

THE opinion states the case.

Walker, for the plaintiff.

Lothrop, for the defendant.

By Court, MANNING, J. The action is *assumpsit* for the price of leather sold to one Gates, on the following guaranty:

"ST. JOSEPH, Sept. 18, 1858.

"JOSEPH GARD.

"*Dear Sir*,—If you will let the bearer have what leather he wants, and charge the same to himself, I will see that you have your pay in a reasonable length of time.

"Yours, etc. J. E. STEVENS."

As plaintiff sold leather to Gates at several different times, and for different amounts, the first question is, whether the guaranty is limited as to time. We think it limited to a single purchase or transaction. We must hold this, or that it is un-

limited both as to time and amount. Every person is supposed to have some regard to his own interest; and it is not reasonable to presume any man of ordinary prudence would become surety for another without limitation as to time or amount, unless he has done so in express terms, or by clear implication. If the guaranty was limited in express terms, either as to time or amount, but not as to both, it might be said it was the intention of the guarantor to leave it open as to the other, or that a further limitation could not be implied. But where it contains no express limitation as to either, and there is nothing in the instrument itself from which it can be inferred that it was the intention of the guarantor to leave it open as to both, we think it must be understood as referring to a single transaction. The case of *Rogers v. Warner*, 8 Johns. 119, and *Whitney v. Groot*, 24 Wend. 81, we think are correct in principle, and not in conflict with any of the cases cited on the argument by plaintiff's counsel.

We are further of opinion that the first moneys afterwards received by plaintiff on Gates's general account should be applied in payment of the leather sold on the guaranty.

It was objected on the argument that it does not appear from the case that it contains all the evidence. That is, as we understand the objection, that it is not so stated in the case itself. It is not necessary that it should be. When a case is made for review of both law and facts, it is presumed to contain all of the evidence, unless there is something on the face of the case itself indicating the contrary.

The judgment below must be reversed, and a judgment be entered for defendant, with the costs of both courts.

MARTIN, C. J., and CAMPBELL, J., concurred.

CHRISTIANCY, J., did not sit in this case.

FOR EXAMPLES OF CONTINUING GUARANTIES, see the following cases, where certain instruments were held to amount to such: *Menard v. Scudder*, 56 Am. Dec. 610; *Lowe v. Beckwith*, 58 Id. 659; *Scott v. Myatt*, 60 Id. 485; 45 Id. 484; *Gates v. McKee*, 64 Id. 545; *Michigan State Bank v. Peck*, 65 Id. 234, and the notes to these cases.

The following is not a continuing guaranty: "Messrs. F. C. & Co.: I hereby guarantee to you the payment of such amount of goods, at a credit of one year, not exceeding five hundred dollars, as you may credit to John H. Prentiss": *Fellows v. Prentiss*, 45 Am. Dec. 584.

APPLICATION OF PAYMENTS. — Rule as to application of payments is, that when the debtor makes a payment he has a right to direct to what debt it shall be applied; in case he gives no direction, the creditor may make the

application to claims then due: *Parks v. Ingram*, 55 Am. Dec. 153. Where neither party makes the application, the law will make it according to the justice of the particular case, in view of all the attendant circumstances: *Smith v. Loyd*, 37 Id. 621. In the absence of the application of a payment by the parties, the law appropriates it to extinguish the oldest charge: *McKenzie v. Nevius*, 38 Id. 291; *Miller v. Miller*, 39 Id. 597; *Parks v. Ingram*, 55 Id. 153. But in *Putnam v. Russell*, 42 Id. 478, it is said that the law will apply it to the debt having the poorest security.

THE PRINCIPAL CASE IS CITED in *Birdsall v. Heacock*, 32 Ohio St. 177, where it was held that the following letter, addressed to a lumber merchant, "Please send my son the lumber he asks for, and it will be all right," is not a continuing guaranty, but was confined to one transaction. Also, that payments afterwards made by the son on account will be applied in satisfaction of the first purchase.

FIQUET v. ALLISON.

[12 MICHIGAN, 323.]

CONVERSION BETWEEN CO-TENANTS. — Where plaintiffs raised a crop of grain on shares upon the land of defendant, and after it was cut, defendant hauled it off, had it thrashed and put in his granary, refused to give any of the grain to plaintiffs, and denied having any for them, this absolute denial of the rights and title of his co-tenants amounts to a conversion.

DOCTRINE THAT THERE CAN BE NO CONVERSION BETWEEN CO-TENANTS applies to things which in their nature are so far indivisible that the share of one cannot be distinguished from that of another, and not to such articles as grain or money, which are susceptible of convenient division.

ASSUMPSIT FOR CONVERSION, WITHOUT PROOF OF SALE. — Where plaintiffs raised a crop of grain on shares upon defendant's land, and defendant takes possession of the entire lot, and refuses to fulfill his contract of giving up a portion to plaintiffs, and his conduct shows a determination to keep their share, he is bound to pay for it, and plaintiffs may, by their consent, convert the transaction into a sale, and maintain *assumpsit* for the price of their grain.

THE opinion states the case.

Lothrop, for the plaintiffs.

Wilcox, for the defendant.

By Court, CAMPBELL, J. Plaintiffs sued defendant for the value of certain grain, in which they claimed an undivided interest, and which, upon demand of their portion, he refused to surrender, denying their rights.

The grain was grown on shares upon defendant's land by one William Jarvis, who was to have possession from April, 1858, to April, 1859, and to put in crops on shares, and to do other farm duties upon shares of other produce. Some ques-

tion was raised concerning his complete fulfillment of the various arrangements; but as there is no proof that it was agreed his rights in the crops, as a tenant in common, should be forfeited by non-fulfillment of any other conditions, and as there is no proof of damages growing out of such non-fulfillment, it becomes unnecessary to consider whether the evidence will or will not warrant a conclusion that he failed in any duty. As the case stands, he was very clearly a tenant in common in the crops.

While they were yet growing, he mortgaged them to plaintiffs, who, at the proper season, caused them to be harvested, when they were drawn off by defendant, who thrashed the grain, and put it in his granary. He seems to have intimated some formal objection, in the outset, to the right of any one but himself to cut the grain; but subsequently, while it was being cut, recognized plaintiffs' privilege to do so.

Two questions arise upon the facts:—

1. Whether defendant's denial and refusal to recognize plaintiffs' rights, or deliver their share, amounted to a conversion; and 2. Whether *assumpsit* will lie for such a conversion; no sale being proven, except of a trifling portion of grain, not equal to the defendant's own separate interest.

It is laid down by most of the authorities that a refusal, by one tenant in common of a chattel, to relinquish possession, is no conversion, because each has as good a right to the possession as the other. But it can hardly be questioned that the refusal of any one to give up to another that to which such other has a better right, would be a conversion. The doctrine referred to applies to things in their nature so far indivisible that the share of one cannot be distinguished from that of another. But it can have no reasonable application to such commodities as are readily divisible, by tale or measure, into portions absolutely alike in quality, as grain or money. When one person is entitled to half of twenty bushels of wheat in a mass, he is entitled to have ten bushels in severalty; and it would be destructive of all his beneficial rights to hold that his co-tenant in the heap could refuse a division, when properly demanded; or that one who held one hundred dollars for himself and a co-tenant could retain the fifty dollars of each. In the case at bar, defendant refused to give up any portion of the grain, and denied that he had any grain for the plaintiffs. Such an absolute denial of title, and refusal to recognize the rights of his co-tenants at all, would, we think, amount to a

conversion, under any circumstances. It is difficult to see how a sale would work any greater prejudice to the co-tenants, who are effectually deprived of their property, so far as it is in his power to deprive them.

The question then arises, whether an action properly lies in *assumpsit*. It is said in several of the cases, that, where property has been tortiously taken, and converted by sale, the owner may affirm the sale, and sue for the proceeds in *assumpsit*; but that where there has been a conversion without sale, the tort cannot be waived. It certainly is somewhat anomalous to place parties in contract relations against their will, where no privity exists; and the cases where it is permitted seem to be justified only on the ground that no prejudice can result to the defendant by allowing it. But where a party commits a breach of a duty, which the law implies from his express contract, *assumpsit* is as appropriate a remedy as any other, if a plaintiff sees fit to resort to it. The plaintiffs here derived their rights as tenants from the contract of defendant with their grantor, creating the tenancy. The grain being in marketable condition, the co-tenant in possession was bound, on reasonable request, to have the plaintiffs' share measured out for them. His own contract precludes him from claiming more than his proportional amount. When he concludes to retain the remainder, he certainly is bound to pay for it; and the plaintiffs may, by their consent, convert the transaction into a sale; as it would have been a sale originally had such consent been given at the time. We think no principle of law is violated by allowing the action to be maintained in its present form.

Judgment must be rendered for plaintiffs, for \$110.48, being the value of the grain when converted, with interest. They are also entitled to costs of both courts.

MARTIN, C. J., and MANNING, J., concurred.

CHRISTIANCY, J., did not sit in this case.

CONVERSION BY CO-TENANT. — Where one of two tenants in common of a quantity of "shot iron" takes possession of it all, mixes it with other iron, manufactures the mixture into various iron wares, so that the common property can be no longer traced or identified, and afterwards sells or disposes of these wares, these acts amount to a conversion of the shares of his co-tenant: *Redington v. Chase*, 82 Am. Dec. 189.

TROVER WILL NOT LIE, AS GENERAL RULE, in favor of one tenant in common against his co-tenant; the possession of one is, in law, the possession of both: *Hall v. Page*, 48 Am. Dec. 235. The two exceptions to this rule are, that

when one co-tenant has lost or destroyed the common property, or has sold the entire property, the action will lie: *Hall v. Page*, *supra*. To the same effect, *Agnew v. Johnson*, 55 Id. 565; *Warren v. Aller*, 44 Id. 406; *Guyther v. Pettijohn*, 45 Id. 499; *Low v. Miller*, 46 Id. 188; *Sanborn v. Morrill*, 40 Id. 701; *Welch v. Clark*, 36 Id. 368; *Rooks v. Moore*, 57 Id. 569; *Rody v. Cox*, 74 Id. 64; *Burbank v. Crocker*, 66 Id. 471, and the notes to these cases.

THE PRINCIPAL CASE IS CITED in *Ripley v. Davis*, 15 Mich. 75, where it was held that where one co-tenant was bound to another by contract to deliver and divide joint property at a certain place, but appropriated it to his exclusive use, and under circumstances which rendered a division and delivery in the manner agreed upon impracticable, it amounts to a conversion, and trover will lie. It is cited in *Erwin v. Clarke*, 13 Id. 11, and in *Wilson v. Owen*, 30 Id. 479, where certain acts by one towards his co-tenant were held to constitute a conversion of the common property. It is cited in *Newton v. Hesse*, 29 Wis. 531, where it was held that one of two tenants in common of chattels naturally severable, such as grain, may sever and appropriate, without the consent of the other, the quantity to which he is entitled; see also *Sutherland v. Carter*, 52 Id. 471. It is again cited in *Watson v. Stever*, 25 Mich. 367, where it was declared to present no corresponding features with the case under consideration. In *McLaughlin v. Salley*, 46 Id. 219, it was held that where a landlord, after his lease was canceled, told his tenant to put in and harvest fall wheat, and promised that he should have his just and lawful share of it, but afterwards harvested and kept it himself, that the landlord and tenant became tenants in common of the wheat, and that the tenant could maintain *assumpsit* on the common counts for the value of his share.

BLANCHARD v. TYLER.

[12 MICHIGAN, 332.]

TO SUSTAIN CLAIM OF BONA FIDE PURCHASER, ONE MUST SHOW that he had no notice of previous conveyance, that his purchase was upon valuable consideration, and that the consideration was paid before the purchaser obtained notice.

DELIVERY OF DEED—WHEN PRESUMED TO HAVE BEEN.—Where a deed appears to have been acknowledged three days after its date, in the absence of proof it will be presumed to have been delivered after the acknowledgment, as such is the usual practice with reference to instruments intended for record.

DEFENSE OF BONA FIDE PURCHASER CAN ONLY BE MADE AVAILABLE by the purchaser himself or those claiming through or under him.

ATTORNMEN TO STRANGER.—Tenant in possession under a lease from one person cannot accept a lease from a third person, and thereafter claim to hold under him. It is incompetent for a tenant, without the consent of his landlord, to change the nature of his tenancy by acknowledging a third person as his landlord.

SUFFICIENT POSSESSION TO MAINTAIN ACTION TO QUIET TITLE.—Where a tenant in possession, with the consent of his landlord, attorns to two persons who have no interest in the land, and one of whom afterwards, as agent for the complainant, leased the whole lot to the tenant, this lease estops the person signing it as complainant's agent from asserting

any claim against the latter, and the tenant being in possession under this lease, ostensibly of the whole tract, and rightfully of at least half of it, gives such possession to the complainant as entitles him to bring an action under the statute to quiet his title to the land.

THE facts of the case are stated in the opinion.

Gould and Pond, for the complainant.

McCurdy and Raynale, for the defendants.

By Court, CHRISTIANCY, J. The bill was filed against Timothy M. Tyler and James Hearse to remove a cloud upon complainant's title to an eighty-acre lot of land in the county of Shiawassee.

The land was patented by the United States to Ira Merrill in 1837.

Merrill (and wife) conveyed to Augustus Grosvenor, July 4, 1838.

Grosvenor conveyed to George Dahash, August 2, 1853.

Dahash (and wife) conveyed to Abram Lewis, July 18, 1855.

All the above deeds were recorded soon after their date, except the one from Grosvenor to Dahash, which was not recorded till the twenty-fourth day of May, 1859; and this delay gave occasion to the transactions which led to the present suit.

Complainant derives his title through an execution sale to him upon a judgment against said Abram Lewis. The levy was made December 30, 1856; the sale, February 28, 1857; the sheriff's certificate of sale was filed with the register of deeds March 3, 1857, and his deed was executed to the complainant June 9, 1860, after the time of redemption had expired, and was recorded the same day. Such is the title shown by complainant.

The defense rests mainly upon a deed from Grosvenor to Tyler, which will be presently noticed. On the seventeenth day of May, 1858, a few days before the time of redemption expired, Lewis, the defendant in the execution, executed a deed of the same lands to defendant Tyler; but this deed, being executed long after the certificate of sale to complainant was filed, was void as against complainant; Tyler being chargeable with notice of the execution sale. But on the twenty-first day of May, 1858, Tyler obtained a quitclaim deed for the same land from Augustus Grosvenor, whose deed to Dahash had not yet been recorded. The bill alleges that

Tyler, at the time he obtained this deed, had knowledge of the previous deed to Dahash, and of complainant's rights, that the deed was without consideration, and that Tyler fraudulently procured it for the purpose of cheating and defrauding the complainant. From a careful examination of the testimony,—which we do not deem it necessary here to review,—including that of Tyler himself,—which charity to him would hardly permit us to review,—we are entirely satisfied that these allegations of the bill are well sustained by the proof. As against complainant, therefore, Tyler acquired no title either by the deed from Lewis or by that from Grosvenor.

But on the third day of August, 1858, Tyler (with his wife) executed a deed of the land to defendant Hearse, and has put in a disclaimer of all interest in the land. The bill charges that Hearse took this deed with full notice of complainant's rights and of Tyler's want of title; alleges that he paid nothing for the conveyance, and that he received the deed for the purpose of defrauding complainant. Hearse denies this, and sets up the defense of a *bona fide* purchase for a valuable consideration without notice. We are strongly inclined to think, from the testimony of Hearse himself, who was sworn in his own behalf, that he was well aware of the nature of the title and of the attempted fraud of Tyler, and that he took the conveyance for the very purpose of aiding Tyler in the perpetration of the fraud upon complainant. But whether he did so or not, or whether he had full notice at the time, is immaterial. He paid nothing to Tyler at the time. Tyler was owing him, he says, about \$7.50, which was to apply on the purchase, and he gave him a note, not negotiable, for six hundred dollars, less the last-mentioned sum. This note, it was understood, should be paid by turning out other notes. This it is claimed was done, but not till some considerable time afterwards. Yet he admits that immediately after the sale to him he was fully informed of the nature of the title. Whatever he paid, therefore, was after such notice; and such payment, if in fact any notes of value were turned out, was made in his own wrong, and he must bear the loss: *Warner v. Whittaker*, 6 Mich. 133.

But it is objected that complainant was not in possession at the time of filing the bill, and that, in the attempt to prove such possession, he has proved the title out of himself and in one John L. Simonson.

Whether this bill could be sustained independent of the

statute,—Comp. Laws, sec. 8490,—we do not think it necessary to decide, as we think complainant has shown a sufficient possession to bring himself within the statute, if that be necessary.

Complainant introduced a deed executed by Lewis to John L. Simonson, bearing date the twenty-ninth day of December, 1856, one day before the levy of complainant's execution, but not acknowledged till the second day of January, 1857, the third day after the levy. In the absence of any proof of delivery prior to the acknowledgment, we must presume that it was not delivered till after the acknowledgment, such being the usual course and practice in reference to the delivery of deeds and other instruments intended for record, as this was, and the deed being incomplete for this purpose till acknowledged. The deed, therefore, being subsequent to the levy, the only ground, if any, upon which Simonson could claim title as against the sale to complainant, would be that of a *bona fide* purchase for a valuable consideration without notice. But this ground could only be made available by Simonson himself and those claiming through or under him. Hearse does not claim through the deed in any way, but in opposition to it. Simonson may have had full notice, he may have known that all he was getting by his deed was the right of Lewis in the land subject to the execution, or he may have paid no consideration, and may not choose to set up any claim on the ground of a *bona fide* purchase; and his subsequent conduct in reference to the attornment of Fuller, his tenant, would indicate that he did not intend to insist upon such claim. So far as defendant Hearse is concerned, the levy must be treated as binding the land from its date. He cannot invoke the aid of the registry law in favor of a deed under which he does not claim, and if he could, that law would cut off all claim he might have under the deed from Lewis to Tyler, as the deed from Lewis to Simonson was prior to that, and on record long before it.

Simonson put Fuller in possession in the spring of 1857, under an agreement that the latter should work the land, pay taxes, keep up the fences, etc. Fuller testifies that he continued to occupy under Simonson until the execution of the lease made to him by complainant, through the agency of E. Gould, May 1, 1860. By this the land was leased to Fuller "for the term of one year from the first day of August [then] next," which (Fuller being then in possession, and Simonson

having agreed to his holding under the Goulds, as will presently appear) we think must be understood as creating a tenancy from the date of the lease, and to expire a year from the first day of August then next.

Simonson's testimony was taken in February, 1862, and he testifies that more than a year before that time the Messrs. Gould—both Amos and Ebenezer Gould—had asked him if he was willing to let Mr. Fuller hold possession under them, and that he assented to his doing so. It was doubtless soon after, and probably in consequence of this assent, that the lease to Fuller was executed by E. Gould, as the attorney and in the name of Blanchard. And as it does not appear that either of the Goulds ever had or pretended to have any claim to the land in their own right, we think it is fair to infer from the circumstances of the case that the assent of Simonson to Fuller's attornment was obtained for the benefit of complainant, and that both the Goulds were acting in his behalf, though there is no direct evidence of this. Fuller testifies that up to the time of this lease he was in possession under Simonson; that he never occupied by arrangement with Hearse, nor under Tyler.

But if the attornment had been actually made to the Goulds in their own right, the execution of the lease by E. Gould as agent of the complainant would estop him, at least, from claiming against complainant, and have the effect to put complainant into possession of the undivided half as tenant in common with A. Gould, if nothing more, to say nothing of the improbability of E. Gould consenting to act as the agent of complainant, and as such leasing the whole property to Fuller, if either he or Amos Gould claimed any right in the property. The lease purported to be for the whole property, and the tenancy was ostensibly of the whole; but if it was rightful only for one half as a tenancy in common, still we are inclined to think such possession was sufficient to enable complainant to sustain his bill under the statute.

But it is insisted by defendant Hearse, that immediately after the thirtieth day of August, 1858, when Tyler's deed to him was executed, he, Hearse, let the land to Fuller, and that Fuller was in possession under him as tenant at the time the bill was filed. But it is clear from the testimony of Hearse himself, that when he called upon Fuller, and when this pretended letting took place, Fuller was already in possession; and from the testimony of Fuller and Simonson it is also clear

that he had been in possession over a year, and then was in possession under Simonson. It is therefore wholly unnecessary to determine what kind of arrangement was actually made on that occasion between Hearse and Fuller as to the latter becoming the tenant of the former, since it was entirely incompetent for Fuller, without the consent of Simonson, to change the nature of his tenancy by acknowledging Hearse as his landlord: See *Byrne v. Beeson*, 1 Doug. (Mich.) 179.

Hearse says he went to the land with Lewis and Tyler to take possession; that Fuller informed him of his holding under Simonson; that Lewis told Fuller he, Lewis, had sold to Tyler, and Tyler to Hearse, and they had come to take possession, etc. Such was the ground upon which Hearse's claim of possession was based; and the attempt to change the tenancy of Fuller by the pretended arrangement claimed to have been made there was not only clearly fraudulent, but it shows that Hearse claimed title through Lewis, the defendant in the execution, and that his claim was therefore thus far invalid as against the levy and sale to complainant.

We think the decree of the court below was clearly right in declaring the deed from Abram Lewis and wife to Tyler, that from Grosvenor to Tyler, and that from Tyler and wife to defendant Hearse, void as against complainant, and in decreeing a release from defendants; and that decree must be affirmed, with costs.

The other justices concurred.

BONA FIDE PURCHASER WITHOUT NOTICE. — Notice on the part of a purchaser that his grantor had made some kind of a prior conveyance to another party whose deed has not been recorded, disqualifies such purchaser from claiming to be a *bona fide* purchaser without notice: *Galland v. Jackman*, 85 Am. Dec. 172, and note 177. It is not sufficient for a party in his bill to allege that he is a *bona fide* purchaser for a valuable consideration. The consideration must have actually been paid, and he must so allege: *Everts v. Agnes*, 65 Id. 314. To constitute *bona fide* purchaser within meaning of recording act, the purchaser must, before he receives notice of the prior unrecorded deed, have advanced some new consideration or relinquished some security for a pre-existing debt due to him; and the mere receiving a conveyance in payment of a pre-existing debt is not enough: *Wood v. Chapin*, 67 Id. 62. Want of notice must be shown at time of payment of purchase-money. If part has been paid before notice, the purchaser is protected *pro tanto*: *Everts v. Agnes*, 65 Id. 314; *Warner v. Whittaker*, 72 Id. 65; *Lewis v. Phillips*, 79 Id. 457. Tenant's attornment to a stranger is void unless with the landlord's consent, or in consequence of a judgment, order, or decree of court: *Fowler v. Oravens*, 20 Id. 153; *Foster v. Morris*, 13 Id. 205. Attornment to one entering upon land without a title is void, and such entry and attornment

are not a disseisin or ouster to create an adverse possession in the one so entering: *Jackson v. Delancy*, 7 Id. 403; see also *Rigg v. Cook*, 46 Id. 462. Tenant who attorns to stranger will be bound by his attornment: *Young v. Smith*, 75 Id. 100.

DEED — WHETHER PRESUMED TO HAVE BEEN DELIVERED AT ITS DATE, OR DATE OF ITS ACKNOWLEDGMENT. — It is elementary learning, and requires the support of no authority to sustain it, that a deed takes effect from its delivery: *McDowell v. Chambers*, 47 Am. Dec. 539; *Floyd v. Ricks*, 58 Id. 374; *Wellborn v. Weaver*, 63 Id. 235. It is equally well settled in cases where no other consideration enters into the question, and in the absence of proof to the contrary, that a deed will be presumed to have been delivered at its date: *Newline v. Osborne*, 67 Id. 269; *Hall v. Benner*, 21 Id. 394; *Breckenridge v. Todd*, 16 Id. 83; *Robinson v. Gould*, 26 Iowa, 89; *Mhoorth v. Central R. R. Co.*, 34 N. J. L. 93; *Billings v. Stark*, 15 Fla. 297; *Carnes v. Platt*, 41 N. Y. Super. Ct. 435; *Wheeler v. Single*, 62 Wis. 380. This proposition needs no further citation of authority. But it often occurs that the deed and the acknowledgment thereof bear different dates, and the question has arisen, as in the principal case, whether under such circumstances the presumption of delivery should attach to the deed as of its date or as of the date of the acknowledgment.

The supreme court of Michigan still hold to their doctrine as laid down in the principal case, that where a deed appears to have been acknowledged at a day subsequent to its date, it will be presumed to have been delivered on the latter date: *Johnson v. Moore*, 28 Mich. 3. In *Eaton v. Trowbridge*, 28 Id. 454, Justice Cooley says: "It is true, it has been decided by this court that as deeds are usually acknowledged before they are delivered, it is to be presumed that when the date of acknowledgment is subsequent to the date of the deed, that the former rather than the latter was the date of delivery. This however is but a bare presumption, and may easily be overcome by circumstances which are inconsistent with the supposed fact." This presumption, that the date of the acknowledgment of a deed is the date upon which it was delivered, appears to be indulged in *County of Henry v. Bradshaw*, 20 Iowa, 255, 262, and *Loomis v. Pingree*, 43 Me. 299-308; and in *Gorman v. Stanton*, 5 Mo. 585, it was held that where the date of the deed is subsequent to that of the acknowledgment the latter may be taken as the date of the deed. So in *Brolasky v. Furey*, 12 Phila. 428, it was held that delivery will not be presumed from the date of a deed which is prior to the date of its acknowledgment. In *Wyckoff v. Ramsen*, 11 Paige, 564, it is said that the acknowledgment of a mortgage is presumptive evidence of the execution and delivery of the mortgage at or before the date of such acknowledgment; and in *Henderson v. Mayor etc. of Baltimore*, 8 Md. 352-359, the court say that where deeds are executed and acknowledged in different counties, and necessarily on different days, the presumption arising from its date that the instrument was delivered on that day cannot stand against the positive averment in the acknowledgment that it was executed afterward. But the weight of authority is against the position that the date of the acknowledgment should be taken *prima facie* as the date of its delivery, and in favor of the doctrine that in the absence of all proof to the contrary, even in cases where the acknowledgment bears date subsequent to the date of the deed, the presumption attaches that the deed was delivered on the day on which it bears date: *People v. Snyder*, 41 N. Y. 397, 402; *Darst v. Bates*, 51 Ill. 439; *McConnell v. Brown*, Litt. Sel. Cas. 459; *Jayne v. Gregg*, 42 Ill. 413; *Blake v. Fash*, 44 Id. 302. In *Raines v. Walker*, 77 Va. 92, the court say that in the absence of proof to the con-

trary, a deed will be presumed to have been delivered at its date; that a subsequent acknowledgment is by no means inconsistent with a prior delivery, or that at most it is not sufficient to rebut the presumption arising from its date. To the same effect in *Harmon v. Oberdorfer*, 33 Gratt. 502, the court say that it may well happen that a deed is delivered and accepted either with an intention not to record it, or to have it acknowledged for that purpose at a subsequent time. The doctrine that where a deed has been acknowledged at a day subsequent to its date its delivery will be presumed as of that day is denied in *Clark v. Akers*, 16 Kan. 166. In *Ford v. Gregory*, 10 B. Mon. 180, the court go to the extent of saying that a subsequent acknowledgment is of itself evidence of a prior delivery. "The delivery of a deed is always presumed to have been made on the day of its date, and its subsequent acknowledgment does not change this presumption; but the delivery may be proved to have occurred at a different time. As, however, a delivery is necessary to the validity and complete execution of a deed, it must have been before the deed can be acknowledged. But the law does not require the clerk to ascertain or to certify the time of the delivery; and as the acknowledgment is only evidence of an antecedent delivery, and the date of the deed is only *prima facie* evidence of the time, other evidence is admissible to prove the time when the delivery was actually made."

THE PRINCIPAL CASE IS CITED to the point that in order to be entitled to the defense of *bona fide* purchaser without notice, the consideration must have been paid before notice was obtained, in *Stone v. Welling*, 14 Mich. 514-525; *Palmer v. Williams*, 24 Id. 323; and *Matson v. Melchor*, 42 Id. 481.

PEOPLE EX REL. ATTORNEY-GENERAL v. RIVER RAISIN AND LAKE ERIE R. R. Co.

[12 MICHIGAN 389.]

IN INFORMATION IN NATURE OF QUO WARRANTO, FRANCHISES AND PRIVILEGES ALLEGED TO BE USURPED need only be set forth in general terms. The government has always the right to call upon those who assume corporate powers to require them to show by what warrant they do so, and when the defendants have set forth their claims by plea, the attorney-general may then reply and show the special grounds upon which he relies.

BANKING BUSINESS IS ENTIRELY FOREIGN TO CHARTER OF CORPORATION formed for the purpose of building and maintaining a railroad.

POWERS OF CORPORATION. — Corporations may use the same incidental means to accomplish a given purpose that might be used by an individual in the absence of restriction, but where it is confined to one kind of business it cannot lawfully engage in enterprises foreign to that business.

ISSUE OF PAPER DESIGNED TO CIRCULATE IN FORM AND SIMILITUDE OF BANK NOTES is an act of banking, and is unlawful for a corporation formed for the purpose of maintaining a railroad.

DUPPLICITY. — In proceedings against corporation for usurping banking privileges, replication which avers that defendant issues paper in the similitude of bank notes, and that they were issued with the intent that they should be put in circulation as money, is objectionable for duplicity.

PLEA DEFECTIVE AS TENDERING IMMATERIAL ISSUE. — In a proceeding against a railroad corporation for usurping banking privileges by issuing paper in the similitude of bank notes, a plea that defendants have issued certain paper which they describe, and which paper as described may or may not be within the meaning of the law preventing banking by unauthorized persons, is defective, as the issue tendered thereby is immaterial.

THE opinion states the case.

Backus and Harbaugh, and Romeyn, for the defendants.

Williams, attorney-general, and T. M. Cooley, for the people.

By Court, CAMPBELL, J. The attorney-general filed an information charging defendants with usurping the following liberties, privileges, and franchises, viz.: "That of becoming proprietors of a bank or fund for the purpose of issuing notes and transacting other business which incorporated banks may and do transact, by virtue of their respective acts of incorporation, and also that of actually issuing notes and carrying on banking operations and other moneyed transactions, which are usually performed by incorporated banks, and which they alone have a right to do"; and inquiring by what warrant they claim to use those franchises, etc.

The plea sets up the charter and avers that under it the corporation was authorized, among other things, to "grant such evidences of debt which might be incurred by said company as may be by the by-laws thereof directed, to such an amount as should be deemed necessary for the transacting of the business of the same,"—"provided such by-laws should not be contrary to the constitution or laws of the United States nor of the state of Michigan." The plea proceeds to set forth certain by-laws requiring the president to sign, and the treasurer, as cashier, to countersign, all evidences of debt, which by the same by-laws were required to be in the form of a promissory note, payable to bearer on demand, at the office of the company, in the city of Monroe; that from time to time large liabilities were adjusted by such evidences of debt, to the amount of two hundred thousand dollars; that one James Q. Adams became the owner of a large amount of these and presented them for adjustment, and they were adjusted by issuing similar evidences for the principal and interest due him; and the plea then denies that the defendants have exercised any of the liberties, privileges, or franchises charged by the information, "except as aforesaid"; and this they claim a right to do.

To this plea the attorney-general replied that the evidences of debt granted to Adams were granted and issued to him "in the form and having the appearance of bank bills, in sums of one dollar, two dollars, and three dollars, the same being printed, from engraved plates of the size in which bank bills are commonly issued, and with vignettes and other devices thereon which are usually found upon bank bills"; that Adams was president, and signed the certificates of indebtedness as such, "and that the same were so granted and issued to him, with intent that they should be put in circulation as money," etc.

To this the defendants demur: 1. Because they say the replication is a departure, the offense set up not being the same set forth in the information; 2. For duplicity, as charging, first, that the evidences of debt were in the similitude of bank bills, and second, that they were intended to circulate as money; 3. That it does not aver an intent in the defendants that they should be put in circulation as money; 4. That it does not admit, deny, or traverse the plea; 5. That the plea traversed the information, and the replication does not join issue upon it.

It is very well settled that in an information in the nature of a *quo warranto* it is not necessary to set forth the franchises and privileges alleged to be usurped, except in general terms. It is always the right of the government to call upon those who assume corporate powers, to require them to show by what warrant they do so; and when the defendants set forth their claims by plea, the attorney-general may reply and show the special grounds he relies on: 2 Kyd on Corporations, 399, 403, 440; Angell and Ames on Corporations, secs. 734, 756, 759, 760; *People v. Bank of Niagara*, 6 Cow. 196; *People v. Bank of Hudson*, 6 Id. 217. The information in the case before us is precisely like that in *People v. Bank of Niagara*, *supra*, and *People v. Utica Ins. Co.*, 15 Johns. 358 [8 Am. Dec. 243]. The first question, therefore, which arises, is, whether the matters set forth in the replication depart from the information, or in other words, whether issuing notes payable to bearer on demand, intended to circulate as money, is business appropriate to incorporated banks, and not within the grants of defendants' charter.

The charter of the defendants authorized them to "grant such evidences of debt which may be incurred by said company, as may be by the by-laws thereof directed, to such an

amount as shall be deemed necessary for transacting the business of the same": Laws of 1836, sec. 11, p. 862. Their right to purchase, hold, sell, lease, and convey estate, either real or personal or mixed, is expressly limited to "so far as the same may be necessary for purposes hereinafter mentioned, and no further": Id., sec. 3, p. 359. Those purposes are strictly confined to the completion and maintaining of a railroad. Any banking business would be foreign to such a charter; and it is difficult to conceive how evidences of debt "necessary for transacting the business of the corporation" could be made to embrace paper issued for general circulation, and payable on demand. In the absence of restriction, it is very possible that a corporation may use the same incidental means, to accomplish a given purpose, that might be used by an individual; but where it is confined to one kind of business, it cannot lawfully engage in enterprises foreign to that business.

By the general laws in force at the date of this charter, it was provided that no person unauthorized by law should "subscribe to or become a member of any association, institution, or company, or proprietor of any bank or fund for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks may or do transact by virtue of their respective acts of incorporation": Laws of 1833, p. 530. It was held in *Bristol v. Barker*, 14 Johns. 204, by somewhat nice verbal criticism, that an individual without partners was not liable to the penalty of this act for doing a general banking business of issue, discount, and deposit. But in the case of *People v. Utica Ins. Co.*, 15 Id. 358 [8 Am. Dec. 243], it was held that whatever might be the case as to individuals, no corporation or association could exercise these powers without direct authority. In the case of *Utica Ins. Co. v. Scott*, 8 Cow. 709, a note discounted by that company was held valid, because the charter gave them express power to loan their funds. But the general doctrine cannot, we think, be questioned; nor can a grant of a single power usually exercised by banks imply the right to any further and different banking powers: *In re Ohio Life Ins. etc. Co.*, 9 Ohio, 291; *Duncan v. Maryland Savings Institution*, 10 Gill & J. 299.

We do not deem it necessary, for the purpose of testing the sufficiency of the pleadings in substance, to examine into our subsequent penal statutes concerning unauthorized banking; as if the issue of this paper constituted an act of banking, it

was not within the charter powers of defendants. We think the issue of paper designed to circulate in the form and similitude of bank notes is an act of banking, and is unlawful for the defendants. But it is objected that the replication is double, because it avers that the paper issued by defendants was not only in the similitude of bank notes, but was also issued with the intent that it should be put in circulation as money. Either of these allegations would be sufficient, under section 5899 of the compiled laws, to render the paper illegal, and subject the defendants to a forfeiture of their charter. It was held in *People v. Bank of Hudson*, 6 Cow. 217, that a replication may state a cause of forfeiture in very general terms, provided that they create but a single material issue. In the present case, the facts all relate to a single alleged putting forth of illegal paper. But the only safe test of duplicity is to see whether a single issue can be made to controvert the pleading by denying any one material fact. If defendants were to deny the similitude to bank bills, the fact that the notes were intended to circulate as money would not be affected by the denial, and would form a complete cause of action. So, if the intent were denied, there would be a good cause of action upon the similitude. No single rejoinder would dispose of the whole replication. We think the replication is open to the objection of duplicity. This renders it necessary for us to examine the plea.

When called upon to show by what warrant they assume to exercise any franchises, the defendants were bound either to deny the exercise of the franchises, or to show what franchises they possess of the kind set forth in the information, and their title to them. In this case, the defendants set up all their claim under their charter. This is declared to be a public law, and being so, we are bound to take judicial notice of it, and to disregard all allegations in conflict with it. We are bound therefore to take notice that the charter of the defendants gives them no authority to issue any paper within the restraining acts. They have set forth in their plea that they have issued certain paper which they describe. But that paper, as described, may or may not be within the restraining acts. They therefore neither confess nor deny the exercise of banking powers, and the issue tendered by the plea is immaterial. Had they denied their exercise, the attorney-general might have replied by averring the issue of illegal paper in such forms as he deemed proper, filing as many replications

as he saw fit to raise separate grounds of complaint. Had they admitted the exercise of banking powers and set up their charter as authorizing it, if it had been a private act issue might have had to be joined upon it, but inasmuch as it is a public act, the plea would have been bad on demurrer. Having done neither, the plea is not issuable, and must be set aside.

An order must be entered setting aside the plea for insufficiency.

MARTIN, C. J., and CHRISTIANCY, J., concurred.

MANNING, J., was absent when the case was decided.

PROCEEDING BY QUO WARRANTO IS REMEDY BY WHICH STATE MAY AT PLEASURE REQUIRE any citizen exercising a public franchise or authority which he cannot legally exercise without some grant or authority from it, to show the warrant under which he acts, in order that there may be a determination of his legal right: *State v. Evans*, 36 Am. Dec. 468; *State v. Harris*, 36 Id. 480.

CORPORATION MAY DO THOSE ACTS ONLY which it is authorized to do by its act of incorporation, and may exercise only such powers as are given in plain words, or by necessary implication, and all powers not given in this direct and unmistakable manner are withheld: *Commonwealth v. Erie etc. R. R. Co.*, 67 Am. Dec. 471. A corporation, in the execution of the purpose for which it was created, may resort to any means that would be proper for an individual in executing the same, unless it be prohibited by the terms of the charter, or by some public law: *Ohio L. I. & T. Co. v. Merchants' I. & T. Co.*, 53 Id. 742; *State v. Commissioners*, 57 Id. 409; *Southern etc. Ins. Co. v. Lanier*, 58 Id. 448; *Bardstown etc. R. R. Co. v. Metcalfe*, 81 Id. 541; *Philadelphia and Sanbury R. R. Co. v. Lewis*, 75 Id. 574; *Abby v. Billups*, 72 Id. 143.

POWERS OF CORPORATIONS. — For cases in which the powers of corporations, acting under certain charters, are discussed, see *Abby v. Billups*, 72 Am. Dec. 143; *Coe v. Columbus etc. R. R. Co.*, 75 Id. 518; *Blair v. Perpetual Ins. Co.*, 47 Id. 129; *Ohio L. I. & T. Co. v. Merchants' I. & T. Co.*, 53 Id. 742; *State v. Woram*, 40 Id. 378.

THE PRINCIPAL CASE IS CITED AND DISTINGUISHED in *People v. De Mui*, 15 Mich. 181, where the court say that, although the allegations of an information may be of a very general character, the existence of the corporation in that case was a jurisdictional fact, which should have been set forth. It is also cited in *People v. Mahoney*, 13 Id. 492, where the court say: "No plea is necessary to bring to the notice of the court facts which the judges must judicially know, and in respect to which no proof could be given."

PEOPLE EX REL. SPEED v. HARTWELL.

[12 MICHIGAN, 503.]

EXPIRATION OF TERM NO GROUND FOR DISMISSAL. — IN PROCEEDINGS IN NATURE OF QUO WARRANTO against respondent for having intruded into an office, the information will not be dismissed, even though it appears that the office which respondent is charged to have usurped has expired since the filing of the information, as the statute provides for the imposition of a fine in a proper case, and also for the payment of costs by the respondent and the recovery of damages by the relator.

WHERE LEAVE OF COURT MUST FIRST BE OBTAINED TO FILE INFORMATION IN NATURE OF QUO WARRANTO, the court may, in its discretion, refuse its permission on the ground that the term of office would expire before the question could be tried; but where the statute permits the information to be filed without permission, this is no objection to the prosecution of the proceedings.

WANT OF NOTICE OF ELECTION DOES NOT INVALIDATE IT. — Notice of election, which omits to state that there will be an election for a certain office, in which there is a vacancy, does not invalidate the election of the person who received the majority of votes for that office.

STATUTE REQUIRING CLERK TO GIVE NOTICE OF HOLDING OF ELECTIONS AND OFFICERS TO BE VOTED FOR is merely directory, and his omission to give notice of an election to a particular office does not invalidate the right to the office of the person receiving the largest number of votes therefor.

THERE IS NO DIFFERENCE BETWEEN ELECTION FOR FULL TERM AND TO FILL VACANCY, with regard to the necessity of giving the statutory notice of holding the election.

ELECTOR IS PRESUMED TO HAVE COGNIZANCE OF PROCEEDINGS OF COMMON COUNCIL, WHICH ARE PUBLISHED in the official paper of the corporation; and where they have declared a vacancy in an office, he will be presumed to know that there will be an election to fill such vacancy as well as to elect officers to succeed those whose terms are about to expire.

SHOULD NOT CONCLUDE WITH VERIFICATION. — A plea to an information in the nature of a *quo warranto* which puts in issue a material allegation in the information, such as that any votes were cast for the relator at the election, should conclude to the country, and not with a verification.

THIS was an information in the nature of a *quo warranto*. The opinion states the facts with sufficient particularity to understand the points made.

Speed, in person, and *Lothrop*, for the relator.

Bishop, for the respondent.

By Court, MANNING, J. The motion to dismiss the information, for the reason that the term of the office which respondent is charged with having usurped has expired since the filing of the information, must be denied. If the only object of the proceedings was to oust the incumbent, there would be great

propriety in granting the motion. But the statute, under which the information is filed, provides for the imposition of a fine in the discretion of the court and the payment of costs by respondent should he be found guilty of the intrusion: Comp. Laws, secs. 5311, 5312. And when the office is claimed by another, the information may be so framed, as in the case before us, as to try the right of such person to the office, who, on obtaining a judgment in his favor, at any time within one year thereafter, may make and file a suggestion that he has sustained damages to a certain amount by reason of the usurpation, and pray judgment therefor against respondent: Id., secs. 5293, 5297. And such information may be filed without leave of the court: Id., sec. 5291. When it is necessary to obtain leave of the court to file the information, the court may, in its discretion, refuse to permit the information to be filed. In the case of *People v. Sweeting*, 2 Johns. 184, the court refused to give leave, because the term of office would expire, and the office be filled by an election, before the proceeding to oust the incumbent could be made effectual. And in *Commonwealth v. Athearn*, 3 Mass. 285, leave was refused on the ground that the term of office would expire before the question could be tried. But in *People v. Loomis*, 8 Wend. 396 [24 Am. Dec. 83], the court refused, under a statute like our own, to dismiss, although the term of office had expired.

Before speaking of the pleadings, it will be necessary to refer to the city charter and to the law of the case.

By the charter, an annual city election is required to be held on the first Tuesday after the first Monday of November in each year, at such places in the several wards as shall be designated by an order of the common council at least twenty days previous thereto, notice of which, and of the officers to be elected, and of the time for opening and closing the poll, is required to be given within three days after the date of such order, by the city clerk, by publication in two or more daily papers published in the city: Laws of 1857, p. 82, sec. 1. A city attorney is to be elected, and to hold his office for two years: Id., p. 74, sec. 1, and p. 77, sec. 13. And if an office becomes vacant, it may be so declared by the common council: Id., p. 80, sec. 22. And if a vacancy occurs in any elective office, other than mayor or alderman, the common council are to appoint some person eligible under the charter to serve in such office until the next annual election, when the vacancy is to be filled for the residue of the official term: Id., p. 80, sec.

26. Such are the provisions of the charter bearing on the questions before us.

The common council declared a vacancy in the office of city attorney, and appointed the respondent to fill it. And the information states that the relator at the next annual election thereafter was duly elected to fill the vacancy, etc.

In the notice of election given by the city clerk, no mention whatever was made of the vacancy. Did this omission in the notice vitiate the election of the relator?

There can be no doubt, had the notice omitted to state that there was to be an election of an alderman in each of the wards of the city at that election, that such omission would not have rendered void the election of such officers. The statute in this particular is directory merely. It is nevertheless the duty of the city clerk to see that it is carried into effect, and if he should wantonly and corruptly omit to give notice of the officers to be elected, he may be punished therefor criminally. To go further than this, and hold the election void, would place it in the power of the city clerk to defeat the election of any or all city officers to be elected at an annual election. Electors are supposed to know what officers are to be elected at a general election, and if in doubt can readily inform themselves. The design of the notice is to remind them of their duty to the public. It is in no way connected with the elector's right to the elective franchise, nor is it a condition precedent to be performed by another to entitle him to exercise the right. There is a material difference, it is said, between an election for a full term and to fill a vacancy. The charter makes none in the case before us, and we cannot make any. We know of no rule of construction by which we can hold the notice both necessary and unnecessary; that is, necessary to the validity of the election of some officers to be elected, and not as to others. The alleged difference is, that an elector may not know of the vacancy, while he is presumed to know of the election of officers for a full term. He must, however, be presumed to have cognizance of the proceedings of the common council, which are published in the official paper of the corporation. And the vacancy was declared by that body, which at the same time appointed the respondent to fill it until it should be filled at a general election.

The first plea to the information admits the vacancy, states the appointment of respondent to fill it by the common council, and says that at the next general election in said city,

held on the third day of November, 1863, there was no election to fill the unexpired term. The people reply to this part of the plea, taking issue on the election to fill the vacancy, and conclude to the country. The plea admits the holding of the annual election, but denies it was an election to fill the vacancy. If the views we have expressed are correct, it was an election to fill the vacancy, as well as for the election of officers for a new term; and the issue made by the plea and replication for a jury to try is one of law and not of fact. We mention this in passing, not that there is any question in regard to it now before us.

The plea further states: "Nor was there any notice given of such vacancy." The people in their replication to this part of the plea admit its truth, and set forth in full a notice given of the city election, which makes no mention of the vacancy, and conclude with a verification. The respondent demurs, and the people join in the demurrer. Want of notice, we have stated, does not vitiate the election. The plea, consequently, is bad. So is the replication, as it tenders an immaterial issue by the new matter set up in it. On this demurrer there must be judgment for the people, as respondent committed the first error.

Respondent's second plea, like the first, sets up various matters as a defense, none of which are material, except the statement that the electors of the city did not vote to fill the vacancy, and that no ballots were cast for that purpose. The plea concludes to the country, and is demurred to by the people, in which the respondent joins, because, first, it offers to put in issue matter not properly issuable; and because, second, it does not conclude with a verification. It is not demurred to for duplicity. Neither of the objections stated in the demurrer is well taken. For if there were no votes given at the election to fill the vacancy, the relator could not have been elected, and that part of the plea is therefore material. And it should not conclude with a verification, as it denies or puts in issue a material allegation in the information, which states that a large number of ballots, to wit, two thousand eight hundred in number, were cast for the relator to fill the vacancy. The issue formed by the information and plea is, whether any votes were cast to fill the vacancy at the election. If there were not, as we have stated, the relator could not have been elected. The information states that there were, and that the relator received the greater number of such votes; both which

facts are material to show his title to the office, and both being material, respondent was at liberty to take issue on either of them.

The third plea is clearly bad, as it relates to the election of respondent for the full term, of which no complaint is made in the information.

There must be judgment for the people on the demurrer to the second replication to the first plea, and on the demurrer to the third plea; and for the respondent on the demurrer to the second plea, with leave to the people to withdraw their demurrer to that plea and add the *similiter*. Neither party to have costs against the other.

CHRISTIANCY and CAMPBELL, JJ., concurred.

MARTIN, C. J., did not sit in this case.

In the note to *People v. Rena. & Sar. R. R. Co.*, 30 Am. Dec. 48, it is said that in this country *quo warranto* will not lie after the expiration of the term of office. In *People v. Loomis*, 24 Id. 33, it was held that where the term of an office has expired before *quo warranto* is applied for, or will expire before trial, the application will be denied, but that where the term expires after the information, but before judgment, the judgment will nevertheless be rendered, as the prevailing party is entitled to costs. For a case in which *quo warranto* will lie against commissioners who are *functi officio*, see *Burton v. Patton*, 62 Id. 194.

NOTICE OF ELECTION. — The case of the *People v. Weller*, 70 Am. Dec. 754, appears to be in conflict with the doctrine of the principal case. In this case it was held that it was necessary to the validity of an election that the governor should issue a proclamation calling the same and enumerating the officers to be elected; that the statute requiring this notice is mandatory; that an office not mentioned in the proclamation cannot be filled at such election, and that the object of the proclamation is to give notice to the electors: See the note to this case. The principal case is cited to the point that "elections fixed by law at a certain time and place may be legally holden, although notice has not been published or given; but if the time be not defined by statute, and is to be fixed by notice, the notice required is imperative": *City of Chicago v. People*, 80 Ill. 496-506. It is cited in *City of Lafayette v. State*, 69 Ind. 218, 228, where the court say that if an election for city trustees is otherwise regular, the want of any notice thereof previously given will not invalidate it. It is cited to the same point in *People v. Witherell*, 14 Mich. 48, and *Commonwealth v. Smith*, 132 Mass. 289.

THE PRINCIPAL CASE IS CITED AND DISTINGUISHED in *Secord v. Fouck*, 44 Mich. 91, where notice of an election for probate judge was held necessary to its legality. The effect of failure to give notice of an election is discussed at length in note to *People v. Bates*, 83 Am. Dec. 750.

PAGE v. MITCHELL.

[13 MICHIGAN, 63.]

DAMAGES FOR ARREST. — In actions for an arrest, the jury are entitled and required to find such general damages as they deem appropriate under the circumstances, for the arrest and detention, as well as any special damages which are proven to their satisfaction, and it is error for the court to confine the jury to damages for mere loss of time in consequence of the arrest.

COURT CAN NEVER CONFINE JURY TO EITHER NOMINAL OR SPECIAL DAMAGES, IF THERE HAS BEEN REAL PERSONAL INJURY, and every deprivation of liberty is so regarded. It is for the jury themselves to determine whether the circumstances should reduce the recovery to a minimum. Consequently, it was erroneous by instruction to limit the damages in an action for an arrest to such a sum as would be "sufficient to pay the plaintiff for his time while he was being arrested and taken to the jail."

ACTION for false imprisonment. The opinion states the case.

Romeyn, for the plaintiff.

Cooley, for the defendant.

By Court, CAMPBELL, J. Plaintiff sued defendant for causing him to be arrested and imprisoned for refusing to testify before him under a void complaint, which, as we held in *Ex parte Morton*, 10 Mich. 208, gave defendant no jurisdiction to make the inquiry. Plaintiff, having been arrested and placed in the custody of the sheriff at the jail, was not locked in the cell, which was given him as a sleeping-room, and was allowed to visit freely the sheriff's apartments, being only restrained from leaving the jail-yard. The court instructed the jury that if they believed this, plaintiff could only recover nominal damages, explaining this expression to mean damages "sufficient to pay the plaintiff for his time while he was being arrested and taken to the jail." Proof was introduced of special damage, including the expense of obtaining a discharge on *habeas corpus*, which became immaterial under this charge.

The court erred in confining the jury to damages for mere loss of time, in consequence of an arrest. In all cases of this nature, the jury are entitled and required to find such general damages as they deem appropriate under the circumstances, for the arrest and detention, as well as any special damages which are lawfully proved to their satisfaction. The court can never confine a jury to either nominal or special damages,

if there has been a real personal injury; and every deprivation of liberty is so regarded. It is for the jury themselves to determine whether the circumstances should reduce the recovery to a minimum. There was also error in taking the imprisonment by the sheriff away from the consideration of the jury. This was done on the ground that there was an escape in law, and therefore no subsequent imprisonment under the precept. As under our statutes the creditor cannot pursue the sheriff or an imprisoned debtor for an escape so long as the latter remains within the county, the doctrines of civil imprisonment have become with us quite unimportant: 2 Comp. Laws, secs. 5552, 5555. But where a defendant is held for a public offense or grievance not civil in its nature, even a voluntary escape permitted by a sheriff does not prevent the officer from retaking him, and it is his duty to make the recapture, for which purpose the writ remains in full force: *Clarke v. Cleveland*, 6 Hill, 844. In this case, while great liberty was undoubtedly allowed to the prisoner, which may and should be considered by the jury, yet there was evidence showing an actual detention within certain bounds of the prison. The prisoner did not remain at large and out of custody. An indictment for an escape must always charge that the prisoner went at large from his custody: 1 Russell on Crimes, 423; 2 Hawk. P. C., c. 19, sec. 14; Archbold's Crim. Pl. 550, 553. So long as a criminal escape has not occurred, the party is certainly in custody under the process; and if the officer is liable for over-indulgence, he is not liable for anything more; and a person arrested and taken to jail must accept such confinement as the sheriff, without exceeding such severity as is lawful, may impose. The indulgence of his jailer may mitigate, but it does not destroy, his imprisonment.

The facts introduced on the trial below had a tendency to show that the plaintiff was active in designing and bringing about his own imprisonment. There was also fair ground for arguing to the jury that the imprisonment itself was very much, if not entirely, under his own control. That it was little more than a farce of his own enacting was forcibly urged before us. But it was for the jury, after all, to say how much the plaintiff had been damaged in person, or sensibility, or pocket, as well as whether or not he was his own jailer in a voluntary martyrdom. If this was so in fact, there can be no substantial grievance to complain of. Whatever we may think of the demerits of the cause, it must be left to the jury

to give to the evidence such force as it deserves, and to measure the damages accordingly.

Judgment must be reversed, with costs, and a new trial granted.

The other justices concurred.

IN ACTION FOR PERSONAL INJURIES, pecuniary loss is not the sole measure of compensation, but damages may be allowed for physical suffering endured, and even for mental agony: *Cooper v. Mullins*, 76 Am. Dec. 638, and note.

THE PRINCIPAL CASE IS CITED to the point that in an action for a false imprisonment the recovery will not be limited to nominal damages because there was no allegation or proof of special damages, — the jury may give general damages in such a case, to be determined by the circumstances, — in *Joseelyn v. McAllister*, 22 Mich. 300–310; S. C., 25 Id. 48; *Welch v. Ware*, 32 Id. 85. The principal case is cited in *Thompson v. Ellsworth*, 39 Id. 719, where the court held that a declaration in a justices' court for false imprisonment, which averred that plaintiff was thereby delayed and injured in his business, at the time and place stated, was sufficient to warrant evidence of damage.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

WHITAKER v. RICE.

[9 MINNESOTA, 12.]

PAYMENT BY ONE JOINT OBLIGOR OF INTEREST DUE ON BOND before the bar of the statute of limitations has attached will take the same out of the operation of the statute, as against his co-obligors; and the statute will commence to run from the date of the last payment; and this notwithstanding the party paying is named in the body of the bond as principal and the other obligors as sureties, and the payments were made by him without the knowledge or consent of the sureties.

ACTION on a bond. The opinion states the facts.

Bigelow and Dalrymple, for the plaintiff in error.

Masterson and Simons, for the defendants in error.

By Court, FLANDRAU, J. On the third day of May, 1854, the defendants, Rice and Becker, together with William Hollinshead, now deceased, executed to the plaintiff a bond in the penal sum of four thousand dollars, conditioned to pay to the plaintiff the sum of two thousand dollars, with interest, within one year from the date of said bond. The obligors were described in the body of said bond as follows: "We, William Hollinshead, of," etc., "as principal, and Edmund Rice and George L. Becker, of," etc., "as sureties." The bond was signed by each of the obligors in the above order, but without any further statement designating their relation to the obligee or to each other. Hollinshead, from time to time, paid the interest upon the bond, according to the tenor thereof; the last of which payments was made on the 26th of September, 1857. These payments were made by Hollinshead individually,

and without the procurement, knowledge, or consent of the defendants or either of them. This action was commenced against the defendant Rice, on the 5th of December, 1861, and against the defendant Becker on the 31st of the same month. No other payments were made on the bond. It will be seen that more than six years had elapsed between the due date of the bond and the commencement of the suit, but that a much less period than six years had run between the last payment of interest by Hollinshead and the commencement of the action. The statute of limitations is the defense set up, and the point presented for decision is, whether the payments by Hollinshead of interest before the statute of limitations had run against the note was effectual to prevent the operation of the statute as against his co-obligors until six years from the date of the last payment.

The argument of the case by counsel was elaborate and able. The briefs furnished the court are exhaustive of the views presented, and we have endeavored to give the case the examination its importance demands. It is exceedingly difficult to arrive at any just conclusion upon the weight of authority. We have the great name of Lord Mansfield for this doctrine as to joint debtors: "Payment by one is payment for all, the one acting, virtually, as agent for the rest; and in the same manner an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due." And we have the court of appeals of New York, by Judge Bronson, asserting that nothing but the great name of Mansfield could have given currency to such reasoning. Quite as great a diversity of decision and reasoning exists between the decisions of the several states, and even in the courts of the same state. So great has this uncertainty become of late that many of the states have endeavored to extricate themselves by statutory provisions. Some directly upon the point involved in this case, as to the effect of a payment by one of several joint debtors upon the running of the statute of limitations against the other debtors, and some upon the effect of payments generally, without particularizing as to joint debtors, as is the case with our own state.

The distinctions which have occupied the courts have generally been as to whether an acknowledgment of the old debt was sufficient to raise a new promise to pay it, or whether a promise was actually necessary, and whether the promise must be absolute, and from what acts or words a promise

could be implied, and various other subtleties, now happily forever put to rest by the passage of a statute making all such matters the subject of writing, and limiting their effect. The deliberation and full understanding which will now accompany every such act will necessarily relieve it of all uncertainty. We at first thought it worth while to endeavor to unravel the various cases which we have found on this subject, but have abandoned it, and cannot give our reason for doing so better than by quoting from the opinion of Judge Bronson, in *Van Keuren v. Parmelee*, 2 N. Y. 526, where he gives a very brief history of the statute of limitations:—

“The statute of 21 James I., c. 16, which limited actions on promises to six years, was not very well received by the legal profession, and although the early decisions under it are not open to much observation, it was not long before the courts began to regard the statute with disfavor, and to resort to the most subtle constructions for the purpose of restricting its influence. There was a period when one who was spoken to on the subject of an old debt could not well give a civil answer without saying enough to take the case out of the statute. At a later period, and since the commencement of the present century, the courts began to regard this as a beneficial statute,—a statute of repose,—and commenced the difficult task of retracing their steps. But there were many obstacles in the way of the backward movement; and the legislature, both here and in England, took up the matter, and went beyond the old statute by requiring a new promise or acknowledgment to be in writing. In consequence of the early departure from principle in the construction of the statute, the different views which prevailed at different periods, and the unequal pace of the courts in attempting to get back on solid ground, the books are full of conflicting decisions, and any attempt to reconcile them would be a useless waste of time”: See also elaborate opinion of Judge Story, in *Bell v. Morrison*, 1 Pet. 351.

Did the question involved in this case depend for its solution upon the principles which have controlled in the cases we have examined, we would feel much safer in leaving the decided cases out of view as authority, and attempting to settle the rights of the parties upon principle, regardless of them. We are constrained to believe, however, that the case at bar depends solely upon our own statute, which is essentially different from that of England and New York, on the effect of a payment.

These statutes, while requiring a writing in the case of a new promise or acknowledgment, leave the effect of a payment untouched: 9 Geo. IV., c. 14; New York Laws of 1849, p. 638, sec. 110.

Before entering upon an examination of the peculiar provisions of our statute on the effect of a payment, we will notice one substantial distinction which existed in the case of payments made by one of several joint debtors in taking the case out of the statute as to his co-debtors, and that was, whether the payment was made before the debt was barred by the statute, or after it had run against it, — many of the judges thinking that in the former case the payment would prevent the operation of the statute, while in the latter it would not. Without saying more than that we think there is some force in this distinction, we will take up our statute and endeavor to show that the legislature must have had that very point in mind when it framed the section upon which the case turns.

The groundwork of our code was that of New York, — much of it is merely a transcript; therefore, wherever we find alterations, we must suppose them to be the work of particular design. The section of the New York code from which our act on this point is taken is as follows: —

“No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title [statute of limitations], unless the same be contained in some writing signed by the party to be charged thereby, but this section shall not alter the effect of any payment of principal or interest”: New York Code, sec. 110.

Our revisors followed this section almost literally down to that point where the New York act speaks of the effect of a payment. They there terminate the section, leaving it to treat exclusively upon the subject of acknowledgments and promises, requiring them to be in writing, and binding only upon the party who signs the same. A new section is then devoted exclusively to the effect of a payment of principal or interest, and is as follows: —

“Whenever any payment of principal or interest has been or shall be made upon an existing contract, whether it be bill of exchange, bond, promissory note, or other evidence of indebtedness, if such payment be made after the same becomes due, the limitation shall commence from the time the last payment was made”: Comp. Stats., p. 534, sec. 24.

What is the meaning of the word "existing" in this section? Clearly it must have reference to the fact of the statute having run against the contract or not. A contract once made is an existing contract until it is paid or barred by the statute of limitations, or its obligation in some other way canceled. When once paid or otherwise satisfied, except by the running of the statute of limitations, it cannot be revived by a payment at all. There can be very little doubt, therefore, that where the statute speaks of existing contracts, it expressly means such as are not barred by the statute of limitations. This section, then, has reference to payments only that are made upon contracts before the statute has run against them. Let us take this contract as an example, and see what the effect of the payment was. The contract was one which gave the plaintiff a right of action against all three of the obligors, or either of them, at any time after it became due, unless this statute deprives him of it. Section 6 of the same chapter in which section 24 above quoted occurs imposes a limitation of six years from the due date of the contract within which such right of action must be enforced if it remains as the due day found it, and nothing occurs to change this limitation, or in other words, if the contingency provided for in section 24 does not happen, of a payment being made of principal or interest before the lapse of the six years, in which case "the limitation shall commence from the time the last payment was made." What limitation is here meant? We think the limitation within which an action can be brought on the contract as made originally between the parties; or in other words, that of section 6, which becomes operative *de novo* upon the particular contract, "whether it be bill of exchange, bond, promissory note, or other evidence of indebtedness," and prevents any interruption of the obligation originally assumed rather than continues or extends it for any additional period of time.

When a contract is entered into, even under the circumstances that color this, two of the obligors being sureties for the other, who was principal, they all understand their rights as defined by the statute. The principal is first, in equity and conscience, bound to pay. He should do so on the due day; but if he fails in this respect, then he should pay as soon thereafter as possible. All parties agree to this, and generally insist upon it. The statute defines explicitly the effect of such a payment upon the contract if made within six years after it.

falls due, which we have endeavored to point out. No one has the right to complain. We do not think the principal of agency, so much discussed in the books when considering the effect of payment by one of several joint contractors, has any force whatever under our statute where the payment is made before the contract is barred. The rights of the parties are defined from the beginning. What would be the effect of a payment made by one of several joint contractors on the rest after the limitation had attached would probably bring up all these old questions, because the statute, as will be observed, is entirely silent on the effect of such a payment, — if, indeed, such silence, after specially providing for all the other modes of continuing and reviving contracts, might not be considered ignoring such a payment altogether.

The counsel for the defendants insists that the legislature would not make a promise binding only upon the party making it, and give the payment of principal or interest greater force, so as to bind all parties. The fact that these two subjects are carefully separated, and the effect of an acknowledgment or promise specially limited to the party making it, while no such limitation is attached to the act of payment on an existing debt, would argue that it was done by design, and intended in one case to have that restricted operation and not in the other. But when this fact is considered with the peculiar wording of the statute and the just obligations of the parties, there can be very little doubt that the whole subject was arranged *ex industria*. When such a contract is entered into, all parties assume the obligation to pay, up to a certain point. The effect of a payment should not be considered solely among the debtors, but taken in connection with the creditor. They all have rights. It is quite fashionable, when a creditor does not force payment at the day, to call him careless and negligent, and say he ought to lose his debt for his laches. His delays are more often attributable to mercy than any worse motive, and debtors should not generally complain in such cases. The statute, by giving the creditor a longer time to wait when the debtor shows his good intentions by paying what he can, was designed more for the benefit of the latter than the former. Now all these mutual obligations continue until the contract ceases to exist, or until the same is barred, which we think are synonymous terms under this statute. But a very different rule would obtain in relation to acknowledgments of the debt, or promises to pay it. Nothing of the

kind enters into the original obligation of the parties, or is in any manner inferable from their contract. So there is every reason why such an undertaking should bind only such debtor as sees fit to make it; and the same reason might well be urged against any payment made on a debt after the same had ceased to be an existing one by the statute of limitations attaching to it. This may be the reason why nothing is said about it in the statute. The three points of acknowledgments, promises, and payments, were clearly in the minds of the legislators in the passage of this statute of limitations. The two first they provided for definitely. The last they regulated so far as relates to contracts before the statute has attached; and as to payments made after a contract is barred they were silent, which will either give rise to an amendment or a construction of the statute on that point when a proper case arises.

We think the court erred in its ruling on this point, and that the plaintiff should have judgment for the sum found due upon the bond. The judgment must be reversed, and judgment entered for the plaintiff upon the findings of the court for the sum due on the bond.

NEW PROMISE BY ONE OF JOINT DEBTORS TO take case out of operation of statute of limitations: See the note to *Van Kewen v. Parmelee*, 51 Am. Dec. 331; and see *McCarthy v. White*, 82 Am. Dec. 754. In *Brisbin v. Farmer*, 16 Minn. 219, it is said that the rule of the principal case, that such a new promise or acknowledgment by one joint obligor will be binding against his co-obligors, applies only to cases where the acknowledgment is made before the bar of the statute has attached.

ALDRICH v. PRESS PRINTING Co.

[9 MINNESOTA, 122.]

ACTION FOR LIBEL WILL LIE AGAINST CORPORATION AGGREGATE.

LIBELOUS MATTER PUBLISHED AGAINST CANDIDATE FOR PUBLIC OFFICE, whether by an individual or a public journal, is not a privileged communication, and will render the person making the publication equally liable for his acts with those who commit the same offense against private individuals.

WHAT ARE PRIVILEGED COMMUNICATIONS, stated.

ACTION for libel. The opinion fully states the facts.

D. Cooper, for the appellants.

F. R. E. and W. B. Cornell, and H. R. Bigelow, for the respondent.

By Court, FLANDRAU, J. This is an action for a libel, brought by the plaintiff against the defendant, a corporation, for the publication of libelous matter in a newspaper published by the defendant. The complaint is demurred to upon the ground that the matter charged as libelous was a privileged or *quasi* privileged communication, which, to be libelous, must have been published with express malice, and without probable cause, and that the defendant is a corporation, and consequently incapable of the commission of an offense depending upon sentiment or passion such as malice.

Theoretically, a corporation is perhaps incapable of passion. I say perhaps, because upon an analysis of the construction and practical operation of these bodies the theory becomes invested with considerable doubt. That they should possess this attribute in law, in order to harmonize their obligations and liabilities with those of individuals prosecuting the same enterprises, there is not only no doubt, but an imperative necessity. Corporations have almost entirely supplanted individual action in many branches of industry. If a citizen sets out on a journey he will find himself almost exclusively in the hands of corporations until his return. The stages, rail-cars, and steamboats by which he is transported, the hotels at which he is entertained, the theater at which he may be amused, and the very newspaper by which he is informed of the events of the day, are generally the property of and controlled by corporations. Manufactures, commerce, mining, lumbering, in fact almost every department of human industry is largely filled by corporations. It is difficult to see why these bodies should be exempt from liabilities depending upon an evil intent or a bad passion, when an individual committing the same offense would be held liable. These corporations may be composed of one man or several. In everything they do, although expressing themselves through agents and officers, they act with as much deliberation, design, and intelligence as an individual. Take, for example, the case of a corporation established for the publication of a newspaper. The members of this body become hostile to a citizen, and determine to injure him. They assemble in their corporate capacity, and resolve to circulate an infamous libel concerning him. One member pens it, and the rest approve. The ensuing morning it is read by thousands, and a citizen who was the day before above suspicion stands before the community branded with crime and infamy. The position that this cor-

poration, being a purely intellectual and ideal existence, is incapable of malice, because malice is an emotion of the heart,—a passion,—is too refined a fiction for tolerance in the practical affairs of life at the present day. The old doctrine that corporations aggregate could not commit torts was always considered questionable, and we believe that the law has now been fully established to the contrary. The cases which will be reported with respondent's brief, under his first point, leave very little doubt upon this question. We have not succeeded in finding any adjudicated case in which the point has been made directly in an action against a corporation aggregate for libel, yet many are analogous in principle, involving the elements necessary to constitute a libel. We think the demurrer is not well taken on this point.

The previous discussion has proceeded upon the ground that the publication in this case was of a privileged character, requiring allegations of express malice to sustain it. Such, however, is not the case; but was it of that character, the malice is sufficiently averred in each count of the complaint.

The defendant insists that it appears from the complaint that the plaintiff was a candidate for the position of senator of the United States at the time of the publication of the article, and that the defendant, as a public journal, was privileged to make such comments upon his character as it saw fit, even where they impute the commission of a public offense, and that under these circumstances they will not be, as in ordinary cases, presumed to be malicious. It nowhere appears from the complaint that the plaintiff was a candidate for the United States Senate except by inference from the libelous article incorporated therein, which speaks of persons proposing the plaintiff as a candidate for the United States Senate, and of his having aspirations for that position, and of his expecting to receive the votes of the legislature for United States senator. Now, we do not understand that the plaintiff affirms any part of this article by inserting it in his complaint; on the contrary, he alleges the whole of it to be false, defamatory, and malicious. Nothing, therefore, can be collected from the article itself as representing the true relation of the parties at the time of the publication. If it was uttered under any peculiar circumstances that brings it within the class of privileged or *quasi* privileged communications, they must appear by direct averment in the complaint or answer.

But would such a condition of things as is claimed by the

defendant, to wit, that the plaintiff was a candidate for a public office and the defendant a public journal, in any manner change the position of the latter in an action for a libel published under such circumstances? There are certain relations in life which, when charges are made against another of crimes or offenses, take away the presumption of malice which otherwise attaches to such charges in the absence of these special relations. In *White v. Nichols*, 3 How. 286, 287, the court, to a certain extent, defines these relations, as follows:—

“1. Whenever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral; or in the prosecution of his own rights or interests. For example, words spoken in confidence and friendship as a caution, or a letter written confidentially to persons who employed A as a solicitor, conveying charges injurious to his professional character, in the management of certain concerns which they had intrusted to him, and in which the writer of the letter was also interested.

“2. Anything said or written by a master in giving the character of a servant who has been in his employment.

“3. Words used in the course of legal or judicial proceedings, however hard they may bear upon the party of whom they are used.

“4. Publications duly made in the ordinary mode of parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the house of commons to hear and examine grievances.”

Under these and similar circumstances, the plaintiff must not only prove the fact of the publication, but also the malicious intent with which it was done. Will the case under consideration bear this test?

Freedom of the press and freedom of speech are equally sacred and equally protected by the constitution. Section 8 of the bill of rights provides that “the liberty of the press shall forever remain inviolate, and all persons may freely speak, write, and publish their sentiments on all subjects, being responsible for the abuse of such right.” In this country almost all officers are elective. The press does not possess any immunities not shared by every individual. In every election the same freedom of discussion of the merits and demerits of candidates is allowed equally to press and people, and every citizen can claim to be interested in the choice of his rulers. Now, can it be said that every household visita-

tion made by itinerant politicians, poisoning the minds of electors with libelous and slanderous charges against candidates, every public harangue filled with similar matter, every clubroom discussion in which such charges are bandied about with licentious freedom and exaggeration, are privileged communications, and impose upon the injured party the necessity of proving that they were uttered and published with express malice? We have never supposed that the freedom of speech, even in this country, could legally be carried to such an extent. Yet, if such is the law as to an article published in a public journal, there can be no good reason shown why it does not extend to all channels of communication between man and man during the pendency of an election. We think a public journal or an individual who indulges in defamatory assertions about candidates for office is equally liable for his acts with those who commit the same offense against private individuals.

The demurrer to the complaint is not well taken, and the order overruling it is affirmed.

WHAT PUBLICATIONS LIBELOUS TO CANDIDATES ARE JUSTIFIABLE. — One, by assuming the *status* of candidate for a public office, places himself and his qualifications before the public, and necessarily subjects himself and his acts and conduct to a closer scrutiny and criticism than he would be otherwise subject to. But the mere fact that one seeks an office does not *per se* confer on others the privilege to criticise or publish any statements concerning the candidate that they may see fit: *King v. Root*, 21 Am. Dec. 102. And to confer any privilege the office sought must be a public one. Thus, the office of trustee of a mining corporation is not such as to render one seeking it amenable to newspaper criticism as to his qualifications and actions: *Wilson v. Fitch*, 41 Cal. 363.

The character of a candidate is in issue, so as to be discussed without incurring liability, so far as his qualifications and fitness for the office are concerned: *Commonwealth v. Odell*, 3 Pittsb. Rep. 449; and to that extent one may publish what he pleases concerning the candidate, being liable for the truth thereof: *King v. Root*, 21 Am. Dec. 102. But while candidates may be canvassed, they may not be calumniated: *Seely v. Blair*, Wright, 358; and calumny or false charges will render the one publishing them liable: *Commonwealth v. Odell*, 3 Pittsb. Rep. 449; *Commonwealth v. Clap*, 3 Am. Dec. 312; *Brewer v. Weakley*, 5 Id. 656. A personal attack on the private life and character of the candidate is not justified merely because he seeks a public office: *Duncombe v. Daniell*, 8 Car. & P. 222; *Charges v. Roue*, 3 Lev. 30; *Commonwealth v. Wardwell*, 136 Mass. 164. In *Sweeny v. Baker*, 13 W. Va. 158, it is said that the only limit of criticism of acts or conduct of a candidate for an office in the gift of the people is that the criticism must be *bona fide*. But as to his person, no such privilege exists, though he be a candidate; and what imputes to him crime, moral delinquency, and the like, is not privileged, but is actionable *per se*: See also *Duncombe v. Daniell*, 8 Car. & P. 222; *Charges v. Roue*, 3 Lev. 30; *How v. Prin*, Holt, 62; *Onslow v. Horne*, 3 Wils. 177; *Hamilton v. Ho*, 81 N. Y. 116; *Barr v. Moore*, 87 Pa. St. 385; *Kimball v. Fernandez*, 41

Wis. 329. But on the contrary, see *Mott v. Dawson*, 46 Iowa, 533, where it is held that there is no cause of complaint if the charges were made in good faith. It is laid down in Iowa and Kansas, that if an otherwise libelous article be published, and the writer believes it to be true and of importance to and for the sole purpose of advising electors, so as to discover to them the real character of the candidate, the publication is privileged: *State v. Balch*, 31 Kan. 465; *Mott v. Dawson*, 46 Iowa, 533; *Bays v. Hunt*, 60 Id. 251. And in any event, if believed by defendant, such fact may be shown in mitigation of damages: *Kinney v. Roberts*, 26 Hun, 166; *State v. Burnham*, 31 Am. Dec. 217. A defendant cannot justify by showing that the libelous and unprivileged article which he signed consisted of the resolutions of a convention called to determine on the proper candidate for an office, and that he signed as chairman of the meeting and at its order: *Lewis v. Faw*, 5 Johns. 1.

The conduct in office of a candidate for re-election may properly be criticised: *George v. Goddard*, 2 Post. & F. 689; *Kershaw v. Bailey*, 1 Ex. 743; but this will not justify accusing a judicial officer in the course of such criticism, of prejudice, partisanship, corruption, and the like: *Curtis v. Mussey*, 6 Gray, 261. To accuse an officer of abandoning his post to secure a nomination for another office, is not justifiable: *Thomas v. Crosswell*, 7 Johns. 264; nor that he attempted to swindle his constituents to obtain a personal advantage: *Powers v. Du Bois*, 17 Wend. 63. To call a candidate for congress a "pettilogging shyster," meaning one who disgraces his profession and resorts to sharp practice therein, is not a justifiable criticism: *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251. But to say of one that his mind is weak, and that he is not therefore to be depended on nor competent for the office, is held not actionable: *Mayrant v. Richardson*, 9 Am. Dec. 707.

LIABILITY OF NEWSPAPERS FOR LIBEL. — It is not the purpose of this note to show what constitutes libel generally, but merely to consider the special rules of the law of libel peculiarly applicable to newspapers, for what they are liable, who is liable therefor, what is privileged, and what will amount to a justification, and proof and pleading.

Who is Liable. — The proprietor or publisher of a newspaper is said to be liable for everything appearing in its columns: *Buckley v. Knapp*, 48 Mo. 152; *Rex v. Walter*, 3 Esp. 21; though he was ignorant of or even forbade the publication: *Andres v. Wells*, 5 Am. Dec. 267; *Storey v. Wallace*, 60 Ill. 51; *Dunn v. Hall*, 1 Ind. 344; *Perret v. Times Newspaper*, 25 La. Ann. 170; *Curtis v. Mussey*, 6 Gray, 260; *Commonwealth v. Morgan*, 107 Mass. 199; *Detroit Post Co. v. McArthur*, 16 Mich. 447; *Scripps v. Reilly*, 38 Id. 10. In *Dunn v. Hall*, 1 Ind. 344, the proprietor was held responsible for a libel published while he was absent, by an agent to whom he had given special instructions to publish nothing exceptional, personal, or abusive. The rule might be otherwise if the nature of the article alleged to be libelous was such that it could not be known to be defamatory at the newspaper office: *Smith v. Ashley*, 11 Met. 367. And punitive damages cannot be given though the publication is libelous, if it was published without the defendant's knowledge and without negligence on his part: *Scripps v. Reilly*, 38 Mich. 10.

A libelous publication will subject the author as well as the publisher to liability, but it is no defense to the latter that he published the author's name: *Dole v. Lyon*, 6 Am. Dec. 346; *Perret v. Times Newspaper*, 25 La. Ann. 170; and he may be sued without joining the writer as a defendant: *Ludwig v. Cramer*, 53 Wis. 193. The master printer has been also held liable: *Rex v. Dover*, 6 How. St. Tr. 547. So, in England, the acting editor is always held

liable: *Watts v. Fraser*, 7 Car. & P. 369; S. C., 7 Ad. & E. 223. But in America, it seems, the editor may plead that the libel was inserted in his absence, without his orders and against his will: *Commonwealth v. Buckingham*, Thach. C. C. 29; or without his knowledge that the article was a libel on any particular individual: *Smith v. Ashley*, 11 Met. 367. The proprietor of a paper is responsible for the publication of a libelous advertisement, though another action be pending against the advertiser: *Harrison v. Pearce*, 1 Fost. & F. 567; and if the editor stands in the position of one who has incautiously published a libelous advertisement, he also is liable: *Keyser v. Newcomb*, 1 Id. 559. A proprietor is not responsible in exemplary damages for the actual malice of a reporter in procuring the publication of a libelous article, unless the former has participated in or ratified and confirmed the malicious act: *Eviston v. Cramer*, 57 Wis. 570.

In *Mecabe v. Jones*, 10 Daly, 222, it was held that the owner of a majority of the stock of a newspaper company, who had a sort of a supervision, but not a controlling influence over articles published, was not liable, it appearing that he had no knowledge of or connection with the article in question. One to whom a printing-press and newspaper establishment was assigned to secure debts has not such a property as will render him liable as proprietor for a libelous publication: *Andres v. Wells*, 7 Johns. 260. Payment by a defendant to the proprietor of a paper for the insertion of the libelous matter complained of is evidence to go to the jury to show his authorship thereof: *Schenck v. Schenck*, 20 N. J. L. 208. Evidence of the admission of the editor is not admissible to show the authorship of the publication until a proper foundation by proof has been laid that the defendant was the author: *Commonwealth v. Guild*, Thach. C. C. 329. An editor is not bound to give up the name of his correspondent, and if he refuse to do so no blame will attach to him, and the plaintiff must be content to sue the proprietor of the paper: *Harle v. Catherall*, 14 L. T. 802. The proprietor of a newspaper who was made liable for the publication of a libel, and mulcted, cannot sue the editor for contribution, though the libel was inserted by the latter without knowledge or consent of the former: *Colburn v. Patmore*, 1 Crompt. M. & R. 73; S. C., 4 Tyrw. 677. In an action against a newspaper, it is sufficient to allege that the defendant is the proprietor, without alleging that he published it: *Hunt v. Bennett*, 19 N. Y. 173.

For What Publications Liable. — Conductors of the public press are not privileged as such in the dissemination of news, but are liable for libelous publications like other persons: *Sheckell v. Jackson*, 10 Cush. 25. There are certain matters of public interest and general concern on which every one may fairly comment, and such right is in no degree the peculiar privilege of the press: *Kane v. Mulvaney*, 1 R. 2 C. L. 402. But, says Odgers, in his work on slander and libel, p. 35, though "newspaper writers, in strict law, stand in no better position than any other persons, they are generally allowed greater latitude by juries. For it is in some measure the duty of the press to watch narrowly the conduct of all government officials and the working of all public institutions, to comment freely on all matters of general concern to the nation, and to fearlessly expose abuses." As to matter which is of the kind a newspaper may discuss, the proprietor will be responsible as far as the truth of facts stated therein is concerned, but for his criticism thereon without malice he will not be held liable: *Fry v. Bennett*, 3 Bosw. 200. The burden of proving that the matter complained of is of the class called "privileged" is on the defendant: *Wilson v. Fitch*, 41 Cal. 303. The general rules as to what constitute matters of public interest are the same whether the

case be one of a publication by a newspaper or by a private individual. For a full discussion, see Odgers on Slander and Libel, 34-52; Townsend on Slander and Libel, 3d ed.

Newspapers may discuss public affairs and criticise public officers in regard to such affairs: *Snyder v. Fulton*, 34 Md. 128. But false statements exceeding the limit of fair and reasonable criticism, and indicating a reckless disregard of the rights of others affected thereby, even concerning such matters as just stated, are libelous: *Gott v. Pulsifer*, 122 Mass. 235; and to prove such recklessness, other articles, or the manner in which the one in question was prepared, may be shown: *Scripps v. Reilly*, 35 Mich. 372. Criticism of the acts of a public officer as such is privileged, and no libel; but when the publication amounts to more than a mere criticism of public acts, and charges a wrongful motive for the act, or attacks the moral character of the officer, it is held not privileged, in England, unless made in the belief of the truth of the charge: *Campbell v. Spottiswoode*, 3 Best & S. 776; *Wason v. Walter*, L. R. 4 Q. B. 93. This rule has been followed in New Hampshire: *Palmer v. Concord*, 48 N. H. 211. But in other states it is held that no privilege exists to attack the character of a public officer: *Hamilton v. Eno*, 81 N. Y. 116; *Sweeney v. Baker*, 13 W. Va. 158; and see the note on pages 40 and 41, Odgers's Slander and Libel, 1st Am. ed. As to attacks upon candidates for office, see the separate note to the principal case, and immediately preceding this.

A fair and true report of a judicial proceeding is not libelous, and may be printed in a newspaper: *Ackerman v. Jones*, 37 N. Y. Super. Ct. 42; *Commonwealth v. Blanding*, 15 Am. Dec. 214; and the publisher may comment thereon; but a newspaper commenting on evidence cannot go to the length of declaring it to be "maliciously or recklessly false": *Hedley v. Harlow*, 4 Fost. & F. 224; nor argue from the facts, in a case in which one accused of felony was acquitted, that he was really guilty: *Hibbins v. Lee*, 4 Id. 243. Words in a newspaper which tend to impeach the honesty and integrity of jurors in office are libelous: *Byers v. Martin*, 2 Col. 605. A statement on authority of a newspaper, and not purporting to be a report of a trial, if libelous, cannot be evaded by proof that it was in fact evidence: *Story v. Wallace*, 60 Ill. 51. The publication in a newspaper of the contents of a petition for disbarment of an attorney, filed in vacation, and not presented or docketed, is not a report of a judicial proceeding: *Cowley v. Pulsifer*, 137 Mass. 392; S. C., 50 Am. Rep. 318; and so an affidavit for arrest, unless the charge be true, if published, is libelous: *Cincinnati Co. v. Timberlake*, 10 Ohio St. 548. A publication concerning the conduct of a case by an attorney, and accusing him of dereliction of duty, is libelous: *Atkinson v. Detroit Free Press*, 46 Mich. 341; *Ludwig v. Cramer*, 53 Wis. 193. A newspaper may publish the fact of an arrest, but must not assume or assert the guilt of him whose arrest it chronicles: *Tresca v. Maddox*, 66 Am. Dec. 198; *Usher v. Severance*, 20 Me. 9. A statement in a newspaper that one was arrested for drunkenness does not assert that he was drunk: *Stacy v. Portland Pub. Co.*, 68 Id. 279.

Reports in newspapers of debates and proceedings in legislative assemblies, if fair and correct, are privileged: *Wason v. Walter*, L. R. 4 Q. B. 73; *Commonwealth v. Blanding*, 15 Am. Dec. 214. Publication in a newspaper of testimony of witnesses before a congressional committee is not libelous: *Terry v. Fellows*, 21 La. Ann. 375. A publication charging a member of the legislature with corruption in his conduct or vote is libelous: *Negley v. Farroe*, 60 Md. 158; *Littlejohn v. Greeley*, 13 Abb. Pr. 41.

A report in a newspaper of the proceedings at a public meeting, including libelous words used by speakers, though in itself a correct account, has been

held to be libelous: *Purcell v. Sowder*, L. R. 1 C. P. D. 781; *Hearne v. Stowell*, 12 Ad. & E. 719; *Duncan v. Duncan*, 7 El. & B. 229.

A newspaper article imputing dishonesty or want of integrity to a private person is libelous: *Huse v. Inter Ocean Pub. Co.*, 12 Ill. App. 627. Newspapers cannot charge private persons with offenses and crimes, and escape liability: *Snyder v. Fulton*, 34 Md. 128; *Barnes v. Campbell*, 59 N. H. 128; S. C., 47 Am. Rep. 183. To falsely state that one was convicted and sent to prison is libelous: *Boogher v. Knapp*, 70 Mo. 457; or to call him a mail thief, scoundrel, and robber: *Woody v. State*, 16 Tex. App. 252; to charge one with adulterating oil: *Steketee v. Kinn*, 48 Mich. 322; to state that a physician caused the death of his patient: *Foster v. Scripps*, 39 Mich. 376; to accuse one of intoxication after being elected to an office as the champion of prohibition: *State v. Mayberry*, 33 Kan. 441.

A story told by the plaintiff against himself in company was published by the defendant to amuse his readers, assuming that plaintiff would not object. In an action for libel the defendant was held liable: *Cook v. Ward*, 6 Bing. 409. A publication in jest, as the result of banter between a newspaper man and another, subjecting the latter to ridicule, was submitted to the jury to determine whether it constituted libel: *Sullings v. Shakespeare*, 46 Mich. 408; S. C., 41 Am. Rep. 166. A newspaper publisher is not liable for ludicrous but innocent misprints in a communication puffing the writer, and describing a surgical operation by him: *Id.* But in *Shepherd v. Whitaker*, L. R. 10 C. P. 502, it was held that the mistake of a printer in setting the type of a newspaper so as to place a firm name under the head of "bankrupts," instead of "partnership," was libelous. See, however, *Scripp v. Reilly*, 38 Mich. 10, where negligence in such cases is held to be the basis of the action. A false and injurious article published for sensational purposes is libelous: *McLean v. Scripps*, 52 Id. 214; *Moffatt v. Caldwell*, 5 Thomp. & C. 256.

Proof of Publication. — In a declaration for publishing a libelous article in a newspaper, it is not necessary to aver that the publication was made to divers persons; that the newspaper was a circulating medium; or to aver in detail the manner and extent of the publication: *Indianapolis S. Co. v. Horrell*, 53 Ind. 527; *Sproul v. Pillsbury*, 72 Me. 20; it is enough to aver that the libel was printed and published in the newspaper: *Sproul v. Pillsbury*, *supra*; and to state the defendant's connection therewith: *Hunt v. Bennett*, 4 E. D. Smith, 361. In *Respublica v. Davis*, 3 Yeates, 128, it is held that distributing newspapers containing libelous matter, and receiving money therefor, is sufficient evidence of publication; but in *Prescott v. Tousey*, 50 N. Y. Super. Ct. 12, it was held that it must be proved that the libelous article was printed and read as well as sold. A copy of the paper purchased at defendant's office is admissible to show the publication in the paper: *State v. Jeandell*, 5 Harr. (Del.) 475; *Woodburn v. Miller*, Cheves, 194. Evidence of a printer in the office to show that the paper was printed with the types which he saw used there is admissible to show that the paper was printed there: *Southwick v. Stevens*, 10 Johns. 443. A statement in a copy of the newspaper of the same or about the same date as that containing the libelous article is admissible to prove the circulation of the paper: *Fry v. Bennett*, 3 Bosw. 200; S. C., 1 Abb. Pr. 289; and 4 Duer, 247. Though a newspaper be printed in another place, evidence of its circulation in the place where the party libeled resided is competent to show its publication there: *Commonwealth v. Blanding*, 3 Pick. 304.

Evidence — Damages — Miscellaneous. — In an action against a newspaper for libel, other publications in the same paper have been held admissible to show malice: *Commonwealth v. Damon*, 136 Mass. 441; and publications in

other numbers of the same paper have been admitted to show that plaintiff was the person intended to be defamed: *White v. Sayward*, 33 Me. 322. So, similar libels upon other people may be admitted to show the recklessness with which defendant conducts his paper, so as to make it a ground for increased damages: *Gibson v. Cincinnati*, 2 Flap. 121. One authorizing the publication complained of in a paper in one city is not liable for special damage resulting from its unauthorized republication in another city: *Clifford v. Cochran*, 10 Ill. App. 570. The fact that a libelous article was copied from another paper is no defense: *McDonald v. Woodruff*, 2 Dill. 244; *Hotchkiss v. Oliphant*, 2 Hill, 510; but may be admissible in mitigation of damages: *Hewitt v. Pioneer Press Co.*, 23 Minn. 178; *Lathrop v. Adams*, 133 Mass. 471; but see *Sheehan v. Collins*, 71 Am. Dec. 271. The publication of a retraction is not a bar to an action for publishing a libelous article, but may be considered in mitigation of damages: *Cass v. New Orleans*, 27 La. Ann. 214. The refusal of a sub-editor of a newspaper to publish a retraction of a libel published in such newspaper does not tend to show malice on the part of the proprietors of the paper, and is not admissible in an action against them for the purpose of enhancing damages: *Edsall v. Brooks*, 2 Rob. (N. Y.) 414. It is no justification or excuse of a libel, published in a newspaper, that the printer of a newspaper did not personally know the party libeled: *Dexter v. Spear*, 4 Mass. 115. A publication in a newspaper, if false, is actionable, though the editor believed it to be true, and acted in good faith; and the law will imply malice from such publication: *Smart v. Blanchard*, 42 N. H. 137; *Littlejohn v. Greeley*, 13 Abb. Pr. 41; *Cass v. New Orleans Times*, 27 La. Ann. 214. The editor of a newspaper may show that he was induced to publish articles by forged letters supposed to have been written by leading citizens: *Story v. Marly*, 86 Ill. 461.

FINLEY v. QUIRK.

[9 MINNESOTA, 194.]

FACT THAT HORSE PROVED TO BE "BALKY" ON TRIAL, three or four days after purchase, is evidence that he was "balky" at the time of purchase, for the purpose of establishing a breach of warranty of soundness and gentleness.

ACTION OF COURT WHERE THERE IS NO ORDER OR OPERATIVE RULING is not ground for exception. So held where on motion of a respondent to require sureties in an appeal bond to justify, the court had ruled that if the respondent would make affidavit that the surety was insufficient, it would require him to justify, or the appellant to furnish another surety, and the latter had excepted to the ruling, at the same time furnishing another surety.

IN ACTION FOR BREACH OF WARRANTY OF HORSE, VALUE OF HORSE cannot be proved by evidence that since the commencement of the action a good and responsible party offered a certain sum for him, which sum was refused.

SALE CONSUMMATED ON SABBATH IS VOID, and an action of warranty in such sale will not lie.

EVIDENCE MUST CORRESPOND TO ALLEGATIONS AND BE CONFINED TO ISSUES, and if in the examination of witnesses facts come out which would furnish ground of relief or defense, such facts must be disregarded unless they are warranted by allegations in the pleadings.

ANSWER BY WAY OF DENIAL RAISES ISSUE ONLY ON FACTS ALLEGED IN COMPLAINT.

DENIAL OF SALE OF HORSE RAISES ISSUE ONLY ON SALE IN POINT OF FACT, and not on the legality of such sale.

FACTS TENDING TO ESTABLISH DEFENSE THAT SALE WAS MADE ON SUNDAY, and is therefore void, constitute new matter by way of defense, and must be pleaded affirmatively.

ACTION for breach of warranty. The opinion states the facts. *Cole and Case*, for the appellant.

***Batchelder and Buckham*, for the respondent.**

By Court, WILSON, J. Action for breach of warranty of a horse.

The suit was originally commenced in justices' court, and after judgment removed by appeal into the district court of Rice County.

In the complaint the plaintiff "charged that the defendant in sale of a horse to him warranted the horse to be sound, perfect in every respect, and true, gentle, and willing to work,—all which representations he knew to be false."

Defendant in his answer "denied the warranty and all knowledge of any defects, and alleged that at the time of sale the horse was sound, gentle, and willing to work."

Verdict was rendered in the district court for the plaintiff, and the defendant thereupon moved the court for a new trial.

The motion was denied, and the defendant appealed to this court. The grounds for a new trial urged in this court are: 1. Error in law occurring at the trial and excepted to; 2. That the evidence was not sufficient to justify the verdict.

These objections we will examine in the inverse order of their statement.

It appeared from the evidence given on part of the plaintiff in the court below, that upon a trial of the horse three or four days after the purchase he proved to be "balky."

Defendant's counsel insist that this is not evidence that he was "balky" at the time of sale. This objection is untenable. The "trial" was not at a time so remote as to justify the belief that a change had taken place in the disposition of the horse between the time of purchase and the time of trial.

The following are the alleged errors of law occurring at the trial and excepted to: —

1. "Upon appeal to the district court the plaintiff moved that the surety on defendant's appeal bond be required to justify, or that he be required to furnish another surety." The

court ruled that if the plaintiff would make affidavit that the surety was insufficient, he would require him to justify, or the defendant must procure another. To this ruling the defendant excepted, and furnished another surety, the surety on the bond not being in attendance.

The "case," from which we have above quoted, does not show any ground for this "exception." It does not show that any order, or, in fact, that any operative ruling was made by the court in the premises, and therefore it is unnecessary for us to inquire whether the ruling of the court below on this point was correct.

2. On the trial the "defendant offered to prove that since the commencement of this suit the plaintiff has been offered one hundred dollars for the horse by a good and responsible party, and refused it. Objected to by plaintiff. Objection sustained, and exception taken by defendant."

This evidence was offered for the purpose of showing the value of the horse. What a "good and responsible party" offered is not evidence of that fact. But even if this evidence was erroneously excluded, the error was corrected by the subsequent admission of evidence of the same fact by other witnesses.

Two witnesses were afterward called by the defendant, and testified to the same point, without objection by plaintiff.

3. In the examination of the plaintiff's witnesses, it appeared that on Saturday the parties met, and the plaintiff agreed to purchase and the defendant to sell the horse at a price agreed upon. The plaintiff then paid five dollars to "bind the bargain," agreeing to pay the balance of the purchase-money on the next day, when the horse was to be delivered. The horse was delivered, and the purchase-money paid on the next day (the sabbath) in pursuance of the contract.

When the plaintiff closed his evidence and rested his case, the defendant moved the court for judgment, on the ground that the evidence showed that the bargain was consummated on Sunday. The motion was denied, and defendant excepted. This is the principal point in the case. We think the only one relied upon by defendant's counsel.

The sale of a horse consummated on the sabbath is void, and an action on the warranty in such sale will not lie: Comp. Stats., p. 730, sec. 19; *Smith v. Wilcox*, 24 N. Y. 353 [82 Am. Dec. 302]; *Northrup v. Foot*, 14 Wend. 248; *Brimhall v. Van Campen*, 8 Minn. 13 [82 Am. Dec. 118]; *Finney v. Callendar*, 8 Id. 41.

It is claimed by the counsel for the plaintiff that this point was not in issue, and therefore that the evidence touching it was irrelevant.

It is doubtless true that evidence must correspond with the allegations and be confined to the point in issue, and if in the examination of witnesses facts come out which, had they been alleged, would furnish ground of relief or defense, such facts must be disregarded, unless they are warranted by the allegations of the pleadings: *Stuart v. Merchants' and Farmers' Bank*, 19 Johns. 505; *Field v. Mayor of N. Y.*, 6 N. Y. 179 [57 Am. Dec. 435].

The defendant insists that the answer does not admit a valid contract.

We will for the present take this for granted, and examine the case in that point of view.

The case therefore turns on the question whether it was necessary to specifically aver in the answer the facts establishing this defense.

We think this must be answered in the affirmative, whether it is viewed as a question of principle or by the light of authority.

Our statute provides that "the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language, etc.; that the answer must contain: 1. A denial of each allegation of the complaint controverted; and 2. A statement of any new matter constituting a defense," etc.; that "an issue of fact arises upon a material allegation of the complaint controverted by the answer," etc.

It will be observed that the plaintiff can only allege facts, and that in the answer the defendant must either deny the facts alleged in the complaint or allege new matter by way of defense or avoidance. And when the answer consists merely of a denial, it is quite clear that the plaintiff will only be required to prove, and the defendant only permitted to controvert, the facts alleged in the complaint: *Allen v. Patterson*, 7 N. Y. 478 [57 Am. Dec. 542]; *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray, 544 [66 Am. Dec. 380].

In the language of Mr. Justice Selden, in the case of *Benedict v. Seymour*, 6 How. Pr. 298, "a general traverse under the code authorized the introduction of no evidence on the part of the defendant except such as tends directly to disprove some fact alleged in the complaint."

If the question of the legality of the sale can be raised by a denial of any allegation of the complaint, it must be by a denial of the sale, for the day or time of the sale is not a material or traversable fact: 1 Ch. Pl. 613, 614, 621; 1 Barb. Ch. Pr. 136; 2 Saunders on Pleading, 219; Stephen on Pleading, 244, 245; *Newman v. Otto*, 4 Sand. 668.

We have above seen that an issue of fact arises only upon a material allegation of the complaint controverted by the answer, and in this case the legality of the sale is not alleged, and of course is not and could not be denied or controverted. Nor is such an allegation necessary, for it is a well-established rule of pleading that it is not necessary to allege what the law will presume, and everything is presumed to have been legally done until the contrary is proved: 1 Ch. Pl. 221; *Maynard v. Talcott*, 11 Barb. 569; Stephen on Pleading, 353, 354; 1 Van Santvoord on Pleading, 330.

But even if it was admitted that the defendant might by a mere denial raise an issue on a fact not specifically alleged, yet the legality of the sale is not a traversable fact but a conclusion or inference of law: 1 Ch. Pl. 213, 214, 540; *Ensign v. Sherman*, 13 How. Pr. 35; *Mann v. Morewood*, 5 Sand. 564; *Lienan v. Lincoln*, 2 Duer, 670; *Lawrence v. Wright*, 2 Id. 673; *Moss v. Riddle*, 5 Cranch, 351; *Mayor v. State*, 8 Blackf. 72.

And a traverse or denial can only be of matter of fact, and not of conclusion of law: 1 Ch. Pl. 612; Stephen on Pleading, 191; 1 Barb. Ch. Pr. 133; Comp. Stats. 541; *Moss v. Riddle*, 5 Cranch, 351; and *Mayor v. State*, 8 Blackf. 72.

The true object of pleading is and always has been to apprise the adverse party of the ground of action or defense, in order that he may be prepared to contest it, and may not be taken by surprise: 1 Ch. Pl. 213, 478; *Mann v. Morewood*, 5 Sand. 564; Story's Eq. Pl., secs. 255-257, 852; 1 Barb. Ch. Pr. 137.

The rules of pleading will generally be found to be ancillary to or the logical sequence of this cardinal principle or rule.

Facts only are to be stated in pleadings, and not arguments, inferences, or matters of law: 1 Ch. Pl. 214; Story's Eq. Pl. 852; *Lienan v. Lincoln*, 2 Duer, 670; *Lawrence v. Wright*, 2 Id. 673; because the statement of facts is necessary to apprise the adverse party of the ground of action or defense.

Mr. Justice Buller well says that it is "one of the first prin-

ciples of pleading that there is only occasion to state facts, which must be done for the purpose of informing the court, whose duty it is to declare the law arising upon those facts, and of apprising the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it": *King v. Lyme Regis*, 1 Doug. 159; 1 Ch. Pl. 218.

With the same object in view, our legislature provides that every ground of action or defense should be stated "in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended."

The answer in this case gives no intimation of the nature of the defense relied upon, or that any defense is to be interposed except by disproof of the facts alleged in the complaint. Such a defense is not admissible under an answer merely by way of denial.

It is not in principle distinguishable from any other which admits a contract in point of fact that is alleged to be void in point of law,—as, for instance, usury, gaming, stock jobbing, coverture, fraud, etc.

The facts tending to establish any such defense are, in their nature, "new matter constituting a defense," or, to use an expression more common in the law, and having the same meaning, "matter in confession and avoidance": *Catlin v. Gunter*, 1 Duer, 266; *Tidd's Practice*, 643, 685; *Fay v. Grimstead*, 10 Barb. 321; *Gould v. Horner*, 12 Id. 602; *Watson v. Bailey*, 2 Duer, 509.

The principles of pleading in courts of law and equity, and the express provisions of our statute, require that such matter should be specifically averred in the answer: See cases last above cited; *Gouverneur v. Elmendorf*, 5 Johns. Ch. 79; *Stuart v. Merchants' and Farmers' Bank*, 19 Johns. 496; *Richards v. Worthley*, 5 Wis. 73; *Stephen on Pleading*, 213; *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray, 541 [66 Am. Dec. 380]; *Bradford v. Tinkham*, 6 Id. 494; 1 Ch. Pl. 526; 1 Id. 213.

Thus only can the answer apprise the plaintiff of the ground of defense, which we have seen is the true object of pleading. This general rule and the necessity for its observance are well illustrated and impressed by the case before us. It is true that at common law in *assumpsit* on the general issue matters of defense of this character may be given in evidence.

But these rulings are not applicable as precedents in this case; because,—1. The general issue cannot be pleaded under

our statute; 2. The rules of pleading under the general issue at common law have always been admitted to be at variance with the principles and logic of that system of pleading: Stephen on Pleading, 158; 1 Ch. Pl. 213, 473, 478, 479, 526; and 3. By the rules of Hilary term, 4 Wm. IV., in England, "this abuse has been corrected," and matters of defense of this character must now be specially pleaded: See said rules; 4. At common law (irrespective of the rules of Hilary term), where there is a contract in point of fact, as in this case, the defendant has the option either to plead the general issue or to plead specially any matter showing it void or voidable in point of law (Tidd's Practice, 643; 1 Ch. Pl. 526; 1 Id. 213, 214), which is a recognition of the principle by us held in this case, that such special matter is not by way of denial, but by way of avoidance of the matters alleged in the complaint. For that which is only a traverse or denial of the allegations of the complaint can never be specially pleaded at common law: Stephen on Pleading, 202, 203; *Bank of Auburn v. Weed*, 19 Johns. 300; 1 Ch. Pl. 527; Tidd's Practice, 653, 654.

We hold, therefore, 1. That an answer merely by way of denial raises an issue only on the facts alleged in the complaint; 2. That the denial of the sale of the horse in this case only raised an issue on the sale in point of fact, and not on the question of the legality of such sale; 3. That all matters in confession and avoidance showing the contract sued upon to be either void or voidable in point of law must be affirmatively pleaded.

We have thus far treated the case as if the answer denied each allegation of the complaint. This, we think, cannot be admitted.

The only facts controverted are: 1. The warranty; 2. The breach of warranty.

These facts only the plaintiff was required to prove. A sale of the horse was admitted, and whether that sale was void or valid was not a question in the case.

The decision of the court below was therefore correct in any point of view.

Judgment affirmed.

WARRANTY OF SOUNDNESS OF ANIMAL, BREACH OF: See the note on this topic to *Roberts v. Jenkins*, 53 Am. Dec. 169 et seq.; as to the measure of damages for a breach, see the note to *Cary v. Gruman*, 40 Id. 303-305.

VALIDITY OF SUNDAY CONTRACTS: See *Brimhall v. Van Campen*, 82 Am. Dec. 118; and *Smith v. Wilcox*, 82 Id. 302, and notes.

ALLEGATA AND PROBATA MUST AGREE: *Green v. Covilland*, 70 Am. Dec. 725; and see *Cochrane v. Halacy*, 25 Minn. 61, citing the principal case.

DENIAL RAISES ISSUES ONLY ON MATTERS ALLEGED IN COMPLAINT: *Adams v. Adams*, 25 Minn. 76, citing the principal case.

NEW MATTER OR MATTER IN AVOIDANCE MUST BE PLEADED: See *Mulry v. Mohawk Valley Ins. Co.*, 66 Am. Dec. 380; *Piercy v. Sabin*, 70 Id. 692, and notes; and see *Nash v. City of St. Paul*, 11 Minn. 178, citing the principal case.

McCUE v. SMITH.

[9 MINNESOTA, 252.]

VERBAL AGREEMENT WITH SETTLER ON PUBLIC LAND, that in consideration of money advanced for the purpose of purchasing it and paying costs and incidental expenses, the lender should have a lien upon the land to secure the repayment thereof, and that the terms of the agreement and charge on the premises should be evidenced by a note and mortgage or other memorandum in writing, as the parties might be advised when the transaction should be consummated, is void under the statute of frauds.

IF CONTRACT, WHICH WAS WITHIN STATUTE OF FRAUDS when made, and might have been avoided thereby, has been fully executed, the statute furnishes no defense.

AGREEMENT WITH SETTLER ON PUBLIC LAND, that in consideration of money advanced for the purpose of purchasing it and paying costs and incidental expenses, the lender should have a lien upon the land to secure the repayment thereof, is void, and the settler is not entitled to the benefit of the act concerning pre-emptions, under the provision that "he or she has not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whatsoever, by which the title he or she might acquire from the government of the United States shall inure, in whole or in part, to the benefit of any person except himself or herself."

SPECIFIC performance. The opinion states the facts.

C. L. Lowell and A. G. Chatfield, for the appellant.

Batchelder and Buckham, for the respondents.

By Court, McMILLAN, J. The complaint in this action avers that prior to the year 1860 the respondents had intermarried with each other, and had lived and cohabited together as husband and wife; that several children had been born of said marriage, and were still living; that the defendant David Smith, in the early part of the year 1860 separated from and abandoned his said wife, without making any provision for her future maintenance and support, and went off to a place called Pike's Peak, declaring at the time his intention

never to live with her again in the relation of husband and wife, leaving her and her children destitute and unprovided for; that she continued to live as the head of the family, not receiving any means of support from her said husband, till October 10, 1860, and so competent to pre-empt in her own name, and hold in her own right, public land of the United States, and that she had settled on the lands described in the complaint; that not having the pecuniary means to pay the purchase-money and costs and incidental expenses and disbursements of the pre-emption, she applied to the plaintiff to furnish her the same, being the sum of \$255, for that express purpose, to be a charge and lien on the premises when so purchased, as her separate property, to secure the repayment of said sum, with interest at the rate of twelve per cent per annum, in one year the said Ann Smith to waive the benefit of redemption, and in default of payment of said sum, with the interest, within the time aforesaid, the premises to be sold and the sale to be absolute; the terms of the agreement, and the charge upon said separate property, to be evidenced by note and mortgage, or other memoranda, in writing, as the parties might be advised when the money should be advanced and the transaction consummated; but in either case the money advanced was to be and remain a charge and lien on said separate property, and the duplicate of said Ann Smith to be deposited with the plaintiff, to obtain and hold the patent as additional security; that the plaintiff accepted the proposition, and the agreement was concluded between the parties, for the plaintiff to furnish said money on the terms and conditions, and for the purpose aforesaid; that thereafter, on the same day, in pursuance of said agreement, the plaintiff advanced the money to defendant Ann Smith, and she purchased therewith the said premises, and received her duplicate; that the parties being so advised, the said Ann Smith then and there evidenced her agreement in writing, in the form of a promissory note, and executed a memorandum in writing, in the form of a deed of mortgage, and by a separate instrument waived her right of redemption, all of which are fully set forth in the complaint.

The complaint further alleges that no portion of the money or interest has been paid; that said Ann Smith, about the time the money became due, removed with her family to Iowa, leaving no property in this state to satisfy any portion of the debt; that the defendant David Smith has never returned to his

family, but remains at Pike's Peak; that said Ann Smith has stated it to be her intention to procure said David Smith to join with her in executing a deed of the premises to some third party, to defeat the plaintiff of his security.

The complaint also alleges that the plaintiff, in pursuance of the said agreement, having the duplicate, surrendered it to the local land-office, and obtained the patent, which he holds as additional security; that he has paid taxes on the property amounting to \$5.76, and claims judgment that the debt be declared a charge or lien on the said separate property of said Ann Smith, according to the terms of the agreement, etc.

The defendants demurred to the complaint, and the demurrer was sustained. The plaintiff appeals to this court.

The first ground of objection stated in the demurrer is, that it appears upon the face of the complaint "that all the agreements and contracts, and the note and mortgage, with its covenants and waiver of redemption, upon which this action is founded, are, and were at the time of the making thereof, unauthorized by and contrary to law and void."

The transaction out of which the alleged cause of action arose was the pre-emption by the defendant Ann Smith of the land described in the complaint.

It distinctly appears that the agreement was concluded and the money advanced by the plaintiff prior to the purchase of the lands by the said Ann Smith. By the agreement as pleaded, it will be perceived that it was to be evidenced by note and mortgage, or other memoranda in writing, as the parties should be advised when the money should be advanced and the transaction consummated.

This agreement, as a verbal contract standing alone, would be void under the statute of frauds. But the complaint, after averring the purchase of the land by the defendant Ann Smith, states that "the parties being so advised, the said Ann Smith then and there evidenced her agreement in writing, in the form of a promissory note, and made and executed a memorandum in writing in the form of a deed or mortgage." And after setting out the note, mortgage, and waiver of redemption according to their tenor and effect, the complaint further alleges that "said Ann Smith thereupon delivered the said duplicate, note, and mortgage to, and this plaintiff received the same in pursuance of said agreement, and as evidence of the same, and with the mutual intent and purpose of charging her said separate estate," etc.

It requires no argument to show that the making of the note and mortgage, whatever may be their effect, was done by Ann Smith, in performance on her part of the verbal agreement, and was received as such by the plaintiff. The parol agreement being executed, therefore, neither of the parties can afterwards object that the contract was within the statute of frauds. Where a contract, which, when made, was within the statute of frauds, and might have been avoided thereby, has been fully executed, the statute furnishes no defense.

But having been made in pursuance of the parol contract, and in performance of it, the validity of the note and mortgage will be affected by anything which impairs the contract itself.

The contract, having been made prior to the purchase of the land by Ann Smith, is clearly within the prohibition of the thirteenth section of the act of Congress of September 24, 1841, under which she pre-empted the lands mentioned in the complaint. The section provides, among other things, that before any person claiming the benefit of the act shall be allowed to enter any lands upon which he or she has settled, such person shall make out "that he or she has not, directly or indirectly, made any agreement or contract in any way or manner with any person or persons whatsoever, by which the title he or she might acquire from the government of the United States shall inure, in whole or in part, to the benefit of any person except himself or herself."

The title, in this instance, which Ann Smith acquired, would, if the contract be valid, inure to the benefit of the plaintiff to the extent of his charge or lien upon the premises. The contract is, therefore, illegal and void, and the note and mortgage, being the fruit of the contract, must fall with it. A court of equity will leave the parties where it finds them, not that it sees anything meritorious in the defendant, but because "no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act."

This view of the case renders it unnecessary for us to consider any of the other questions raised under the demurrer.

The order sustaining the demurrer is affirmed.

EXECUTED AGREEMENT IS NOT WITHIN STATUTE OF FRAUDS: *Sweeney v. Moore*, 74 Am. Dec. 134; and see *Townley v. Moore*, 30 Ohio St. 193, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Woodbury v. Dorman*, 15 Minn. 338, to the point that a mortgage by a pre-emptioner on public land to secure the

purchase-money, costs, etc., is void; but in *James v. Tainter*, 15 Minn. 514, 515, both of these cases are overruled on this point. In *Warren v. Van Brunt*, 19 Wall. 655, it is cited; and it is held that an entry on public lands by one person in trust for another, being forbidden by statute, equity will not, on a bill to enforce such a trust, decree that any entry in trust was made.

STONE v. MYERS.

[9 MINNESOTA, 303.]

JUDGMENT AGAINST NON-RESIDENT DEFENDANT having property in the state, the summons having been served by publication, is conclusive upon the question whether the defendant had property in the state to give the court jurisdiction, except in a direct proceeding in the action itself, for relief; it cannot be collaterally attacked therefor.

JURISDICTION OVER NON-RESIDENT ON SERVICE BY PUBLICATION results from the fact that he has property within the jurisdiction, and extends only to such property as was within the state when the jurisdiction attached.

CREDITOR, TO OBTAIN RELIEF AGAINST FRAUDULENT DISPOSITION OF PROPERTY by debtor, must show himself to have been a creditor at the time the act was done which he claims to be in fraud of his rights.

LIABILITY OF OBLIGOR IN BOND ATTACHES BY MAKING OF INSTRUMENT, and he is then a debtor, so as to prevent the disposition of his property to the injury of the obligee until he has complied with the conditions of the bond.

SUIT to set aside certain conveyances as fraudulent. Defendant executed to plaintiff a bond to convey, the conditions of which plaintiff alleges defendant never performed. Subsequently plaintiff commenced an action against defendant upon said bond, and recovered judgment therein. Prior to the commencement of said action, but after the making of the bond, defendant conveyed away certain of his property to his wife, as plaintiff alleges, with a fraudulent intent as against him. Plaintiff asks that these conveyances be set aside and the property applied to his judgment. Defendant alleges that at the time of said action, he and his wife were not residents, and that the summons was not served in any manner but by publication. The reply admits the service of summons by publication, and that defendant was a non-resident, but further avers that the latter had certain property in the state, which was proceeded against in the action by attachment.

L. M. Brown, for the appellant.

A. G. Chatfield, for the respondents.

By Court, EMMETT, C. J. Whether the defendant, Jacob Myers, had property in the state to give the court jurisdiction in the action mentioned in the complaint, wherein the plaintiff recovered a judgment against him, is not a question that can be raised in this collateral way. We regard the fact of the judgment having been so rendered as conclusive upon that question, except in a direct proceeding in the action itself for relief. But even in this view, the question is of no practical importance to a non-resident defendant against whom judgment has been rendered, in any case in which the court obtains jurisdiction by reason of his having property in the state; because, as it is property alone that confers jurisdiction in these cases (and then only to the extent of such property), it would seem to follow that the judgment would expend itself on the property which conferred, or aided in conferring, the jurisdiction, which would only embrace such as was within the state at the time the jurisdiction attached. It would not, therefore, seriously injure the defendant in such an action, even if there were, in fact, no property at the time to confer jurisdiction, because there would be nothing on which the judgment could be levied.

But such a judgment, though in form *in personam*, is in effect only a judgment *in rem*. It is a judgment for no other purpose than to reach the property which a non-resident may have in the state, but who is not personally served with process therein. It is confined exclusively to such property, and is of no further force when that is exhausted. Beyond this, it is evidence of nothing; nor does it bind or conclude the defendant in anything. An action could not be maintained on it in any other court here or elsewhere; nor, in my opinion, would the party in whose favor it was rendered be precluded thereby from still bringing another action on the original consideration for any balance that might be due to him after exhausting the property which was in the state at the time jurisdiction attached. To hold that a judgment thus rendered has any vitality after exhausting the only thing over which the court rendering it had jurisdiction, is violative of a principle inherent in all free governments, and which constitutes an inflexible rule at common law, viz., that no one can be condemned unheard. It is not disputed that whatever of interest the defendant Jacob Myers now has in the property sought to be reached by this action, he also had at the commencement of the action mentioned in the complaint in which the plaintiff re-

covered a judgment, as therein stated. It is further virtually admitted that his interest in said property formed the sole foundation for such jurisdiction as the court acquired in said former action, he having no other property in the state at the time. It is manifest, therefore, that in determining the real merits of the controversy between these parties, it would be of the utmost importance to ascertain whether the interest which the pleadings show the defendant Jacob to have had in said land was "property" within the meaning of the term as used in the statute, and as such liable to seizure on attachment or execution. Neither party, however, has thought it necessary to give prominence to this question, or indeed to do more than refer to it in very general terms, and we have no disposition to decide a question of so much importance upon such argument merely, especially as the case may be disposed of without touching the point referred to.

We have repeatedly recognized the doctrine that in order to entitle a creditor to relief against a fraudulent disposition of property by his debtor, he must show himself to have been such creditor at the time the act was done which he claims to be in fraud of his rights.

Nor is our confidence in the soundness of this doctrine at all shaken by the difference which counsel for the plaintiff has pointed out between our statute and that of the state of New York, from which ours is alleged to have been taken. The statute of New York, it is true, puts the construction beyond question by declaring certain conveyances "fraudulent as against the creditors at the time of the person paying the consideration," while the statute of this state omits the words "at the time." We are of opinion that the doctrine has its foundation in principle, and not in a mere provision of statute; and that, if our statute on the subject was really drawn from that of New York, the omission referred to was not designed to inaugurate a different doctrine here, but rather occurred because it was not thought necessary to declare what was already well settled by numerous decisions.

The defendants here insist that the plaintiff was not a creditor of the said Jacob Myers until after breach of the condition of the bond on which the former action was brought; and that it nowhere appears in this case when such breach occurred. On the other hand, the plaintiff contends that he became a creditor from the date of his bond; and in this we think that the plaintiff is right. By the very terms of a bond,

the obligor acknowledges himself to owe, and the condition merely points out the way in which this admitted indebtedness may be avoided. The debt cannot, in strictness, be said to accrue on breach of the condition,—it remains if the condition be not complied with. The fact that the statute or equity interferes and prevents the collection of more than the damage really sustained does not change the principle, but rather confirms it; because, but for such interference, the whole of the bond would be collected as of course. The liability is incurred by the making of the instrument, and the obligor is a debtor by his own acknowledgment under seal from that time and until he complies with its conditions.

But even this does not relieve the plaintiff altogether from the objection that he was not a creditor at the time the conveyances were made against which he seeks relief.

There are three of these conveyances,—one long prior to the execution of the bond on which the plaintiff recovered his judgment, another made by the plaintiff himself, bearing date the same day as said bond, and the other made some time afterwards. They all run to the defendant Susan R. Myers, as grantee, and in every instance the consideration is alleged to have been furnished by the defendant Jacob Myers, and the deed made to his wife, the said Susan, “with intent and design, and for the purpose of hindering, delaying, and defrauding his creditors.” And these allegations are not denied.

The plaintiff prays that each and all of these conveyances be adjudged fraudulent as against him; that a trust therein be declared in his favor to the extent necessary to satisfy his judgment; that each be declared subject to such trust in the hands of said grantee; and that the lands thereby conveyed, or sufficient thereof, be sold to satisfy his said judgment, costs, etc. The court below ordered judgment to be entered for the plaintiff for the relief demanded in the complaint, which, in our opinion, was entirely too broad, in view of the facts above referred to. For whether or not the plaintiff, after participating as above stated in one of the acts claimed to have been fraudulent, can take advantage of his own conveyance in this manner, or whether or not he would not, at any rate, have to show affirmatively to the satisfaction of the court that the bond actually preceded the conveyance of the same date [questions which it is not necessary to decide at this time], one thing is certain, the order for judgment does include one conveyance, about which there can be no dispute in regard to its having been made prior to the time when the

plaintiff, according to his own showing, became the creditor of the defendant Jacob Myers; and this alone would render the order erroneous.

The plaintiff insists, however, that he needs not to depend upon the resulting trust to his use as a creditor, created by the statute; that the actual fraud alleged and not denied entitles him to the relief he demands. We will not inquire into the merits of the point here made; suffice it to say that we might admit the truth of the proposition it embraces, and still the order appealed from would be equally liable to the objection above stated; for whether the plaintiff, as a creditor, claim relief under the statute, or on the more general ground of fraud, admitted by the state of the pleadings, it is quite as necessary in either case, before he is entitled to the relief he asks, that he should have shown himself a creditor at the time of the commission of the fraudulent act from which he seeks to obtain relief, and equally true that a judgment in accordance with the order here appealed from would not be justified in the one case more than in the other.

But might we not modify the order for judgment in respect to the objection above mentioned, and permit it to stand as to the remainder? There is no doubt that the statute would authorize such a course, but we prefer not to pursue it in this case. We could do not do so without first deciding the question of property hereinbefore mooted, and about which we have purposely abstained from giving an opinion without further argument. Moreover, the person most affected by a judgment against the defendants in this action is a married woman, resident of another state, who asks in any event to be permitted to amend the answer, so as to put in issue matters before passed without denial. It is true that a joint answer for both the defendants was put in by the same attorney; but as she may never have been consulted, even, with regard to her answer, there is abundant reason why she should not be irrevocably bound by it, as would be the result were we to modify the order as suggested.

The order for judgment must be reversed.

JURISDICTION OF NON-RESIDENTS AND THEIR PROPERTY: See *Molynaux v. Seymour*, 76 Am. Dec. 662, and note 665; *Sturgis v. Fay*, 79 Id. 440. As to service of summons by publication, see *Flint Riv. Steamboat Co. v. Foster*, 49 Id. 273.

VOLUNTARY CONVEYANCES ARE FRAUDULENT ONLY AS TO EXISTING CREDITORS, and subsequent creditors cannot complain thereof: *Horn v. Volcano W. Co.*, 73 Am. Dec. 569.

CASES
IN THE
SUPREME COURT
OF
MISSOURI,

STATE v. MEEROHOUSE.

[34 MISSOURI, 344.]

TO CONSTITUTE DWELLING-HOUSE IN SENSE NECESSARY TO MAKE UNLAWFUL BREAKING BURGLARY, no one need be in the house at the time, provided the owner had the intention of returning.

HOUSE CEASES TO BE DWELLING-HOUSE in sense necessary to make unlawful breaking burglary, if the owner locks it up and leaves it with a settled purpose not to return.

INDICTMENT for burglary and larceny. The opinion states the case.

J. E. Belch, for the plaintiff in error.

Welch, attorney-general, for the defendant in error.

By Court, **BAY, J.** At the May term, 1863, of the Osage circuit court, the defendant was indicted for burglary and larceny, and at the November term following tried and convicted. The usual motions for new trial and in arrest were made and overruled, and the case is brought here by writ of error. No objections have been urged to the instructions given on the part of the state. The defendant asked five instructions, and it is insisted by the attorney-general that all were given, while it is contended by defendant's counsel that his fifth instruction was refused. The difficulty grows out of the imperfect manner in which the record is made up. From all, however, that we can gather from the record, it appears that the instruction, as asked by defendant, was in the following words: "A dwelling-house is a house in which the occu-

pier and his family usually reside at the time the burglary was charged to have been committed."

The court gave the instruction with the following words added: "That is, the building was a dwelling-house, and not an outhouse."

During the argument of the case, and while defendant's counsel was addressing the jury, some altercation took place between the court and counsel as to the meaning and interpretation that should be given to the instruction, whereupon the court withdrew the instruction and gave the following in lieu of it:—

"A dwelling-house is a house in which the occupier and his family usually reside, and in this case it is not necessary that any person should be actually in the house."

We see in this no ground for reversing the judgment. The instruction, as finally given, is subject to no legal objection, and substantially contains the principle embraced in the instruction as asked by defendant.

It has, however, been very ingeniously argued, that the building alleged to have been broken open was not a dwelling-house, and therefore the offense is not burglary. The proof upon this point shows that the premises belonged to one Frans Hutchmeyer. Hutchmeyer was a witness on the part of the state, and testified that he was the owner of a dwelling-house in Osage County; that he had lived in the house, but moved out of it some time in the spring of 1862, and went about four or five miles off to live with his brother, leaving a part of his furniture in the house; that he returned in three or four months; that at the time he left he locked the house up, and that during his absence no person had lived in it; that on his return to the house, he discovered that it had been broken open and some things stolen.

As this indictment is for burglary in the second degree, it is not necessary to show that any person was in the house at the time of the breaking and entering; but it is necessary that the house should be a dwelling-house. In Roscoe's Criminal Evidence, 5th Am. ed., p. 350, reference is made to many of the leading English cases, from which it appears that a temporary locking up of the house, or absence of the proprietor and his family, does not make it any the less a dwelling-house. The following cases are particularly cited:—

If A, says Lord Hale, has a dwelling-house, and he and his family are absent a night or more, and in their absence a thief

breaks and enters the house to commit felony, this is burglary: 1 Hale P. C. 556; 3 Co. Inst. 64.

So if A have two mansion-houses, and is sometimes with his family in one and sometimes in the other, the breach of one of them in the absence of his family is burglary: Id.; *In re Yong*, 4 Coke, 40 a.

So if A have a chamber in a college or inn of court, where he usually lodges in term time, and in his absence in vacation his chamber or study is broken open, this is burglary: 1 Hale P. C. 556.

Again, the prosecutor being possessed of a house in Westminster, in which he dwelt, took a journey into Cornwall, with intent to return and move his wife and family out of town, leaving the key with a friend to look after the house. After he had been absent a month, no person being in the house, it was broken open and robbed. He returned a month after with his family. This was adjudged burglary: 2 East P. C. 496.

In this country it has been held that if A have a residence in the city and one in the country, residing with his family during the summer in one, and in the winter in the other, the breach of either, during the absence of A and his family (though no person may be sleeping in it), for the purpose of committing a felony, is burglary.

It is equally well settled that if the owner locks up his house and leaves it, with a settled purpose not to return, it ceases to be his dwelling-house in the sense necessary to make an unlawful breaking a burglary. To continue it his mansion-house he must have quitted it *animo revertendi*.

In the case at bar, we think it apparent that the owner of the premises had no intention to remain away permanently. He left most of his furniture in the house; made no effort to rent it or make any disposition of it whatever, and returned to it after an absence of three or four months at his brother's, who resided in the same county.

The other judges concurring, the judgment will be affirmed.

WHAT CONSTITUTES DWELLING-HOUSE IN SENSE NECESSARY TO MAKE UNLAWFUL BREAKING BURGLARY: See *Re parte Vincent*, 62 Am. Dec. 714; and note to *Workman v. Insurance Co.*, 22 Id. 144.

CARSON'S ADM'R v. SUGGETT'S ADM'R.

[24 MISSOURI, 264.]

REVERSAL OF JUDGMENT ENTITLES APPELLANT TO BE RESTORED to all that he has lost by the judgment.

PLAINTIFF WHO, AFTER REVERSAL OF JUDGMENT IN HIS FAVOR, VOLUNTARILY DISMISSES HIS SUIT, cannot set up his original claim to the property in defense of an action by the defendant to be restored to what he has lost by the judgment.

COMPROMISE BY DEFENDANT OF JUDGMENT AGAINST HIM MUST BE PLEADED by plaintiff in bar of the prosecution of a writ of error by the defendant, and cannot be set up in defense of an action by the defendant, after reversal of the judgment, to be restored to what he has lost thereunder.

JUDGMENT RESTORING DEFENDANT TO WHAT HE HAS LOST UNDER REVERSED JUDGMENT does not affect plaintiff's right to the property, or bar him from prosecuting his original claim, the effect of such judgment being merely to restore the parties to their *status* before the rendition of the original judgment.

ACTION by the administrator of Carson against the administrator of Suggett. Judgment for the plaintiff, and error assigned by the defendant. The opinion states the case.

C. H. Hardin, H. C. Ewing, and J. L. Smith, for the plaintiff in error.

H. C. Hayden, for the defendant in error.

By Court, BATES, J. Suggett sued Carson's estate in the Callaway circuit court for a negro, and recovered judgment for the negro and damages. The negro was delivered, and the damages paid to Suggett. Afterwards the case was taken to the supreme court, which court reversed the judgment of the circuit court, and remanded the cause to that court, where Suggett voluntarily dismissed the case.

This suit was then brought against the administrator of Suggett, who had died, for the return of the negro and the damages paid him, and also for the hire of the negro while he had him.

The defendant answered, and, among other things set up as defenses, alleged the original title of Suggett to the negro (but did not set up any title acquired since the judgment of the supreme court). This defense was, on motion, stricken out of the answer. This was proper. After the decision of the case by the supreme court, Carson's estate was entitled to be restored to all that it had lost by means of the original judgment of the circuit court. This, of course, included the return of the negro and the money, delivered in performance of the

original judgment; and this should have been done without any reference to or effect upon Suggett's right to the negro, and which he might have established and enforced in that or another action. Having dismissed that action voluntarily, he cannot now require Carson's administrator to establish his title to the property, nor can he resist the claim of Carson's estate by showing title in himself acquired before the judgment of the circuit court in the former case.

The answer upon which the case was tried also alleged that the administrator of Carson voluntarily, and as a matter of compromise of said suit, and as a complete settlement between them of all matters in controversy in relation to said slave Jim and in relation to said suit, surrendered and delivered to said Suggett the possession of said slave Jim, and paid to said Suggett the said sum of \$201.

At the trial some evidence was given tending to prove this allegation (although it is difficult to comprehend what compromise there could be in the payment and performance of the whole judgment). And the defendant asked the following instruction, which was refused: "That if the administrator of the estate of Carson delivered the slave Jim to Suggett and paid him the sum of \$201 as damages for the detention, and the said administrator and the said Suggett agreed that such delivery and payment would be and was a final settlement and adjustment of the claim of said Suggett to said slave and damages, the finding of the court should be for the defendant."

There was no error in the refusal of this instruction. If there was any such settlement and adjustment of the claim of Suggett, it would have amounted to a release or waiver of error, which could have been pleaded in the supreme court in bar of the prosecution of the writ of error; but Suggett, having failed so to plead it, is barred by the judgment of the supreme court from asserting it in this case; but a judgment in this case does not bar Suggett from prosecuting his original claim to the slave. No other instructions were asked on either side. Among other matters given in evidence by the plaintiff to show the value of the hire of the slave Jim, were certain reports made by the administrator of Carson to the county court of the hiring of the slave of Carson's estate, for periods of time before Jim had been delivered to Suggett. This testimony was incompetent for the purpose. There was, however, other testimony of the value of the hire of the slave, sufficient to justify

the amount found by the court, and we cannot therefore perceive that the error of admitting that testimony was injurious to the defendant.

The effect of the judgment in this case is only to restore the parties to their *status* before the rendition of the judgment in favor of Suggett against Carson's administrator; and the judgment in this case is no bar to proceedings by Suggett's administrator to establish his original right to the slave. No question was made as to the remedy adopted in this case, and no inquiry whether the plaintiff might not have had full relief by motion in the original cause.

Judgment affirmed.

BAY and DRYDEN, JJ., concurred.

REVERSAL OF JUDGMENT PLACES PARTIES IN SAME POSITION as if judgment had never been rendered, and restores them to their original rights so far as this can be done without prejudice to third persons: *Tarleton v. Goldthwaite's Heirs*, 58 Am. Dec. 296; *McJilton v. Love*, 54 Id. 449, and note 454; and see the note to *Little v. Bunce*, 28 Id. 368-372, on the restitution of property upon the reversal of a judgment. In *Duncan v. Ware's Ex'rs*, 24 Id. 772, it is held that the reversal of a judgment does not entitle one to a recovery of money paid upon it, if it is shown that the money so paid was actually due.

BLOSSOM v. VAN COURT.

[34 MISSOURI, 300.]

ONE WHO CONVEYS LAND BY DEED OF GRANT, BARGAIN, AND SALE after the first day of February is liable for the taxes of that year under his implied covenant against encumbrances, where the statute requires the tax to be assessed against the person owning the land on the first day of February.

ACTION to recover the amount of taxes paid by plaintiff for the year 1857 upon land conveyed by defendant to plaintiff on February 11, 1857. The opinion states the case.

Bland and Colman, for the appellant.

T. T. Gantt, for the respondent.

By Court, BATES, J. This is a suit upon the covenant against encumbrances expressed in the words "grant, bargain, and sell," in a conveyance of land.

The only question upon which it is necessary to give an opinion is as to the liability of Van Court to pay the taxes for

the year 1857, his deed to Blossom having been made on the eleventh day of February in that year, and he having been the owner of the land on the first day of February.

1. The state and county taxes constitute a liability of the owner of the property as well as an encumbrance upon the land itself, which could be sold for their non-payment.

2. The eighteenth section of the second article of the act of 1855 concerning revenue is as follows: "Every assessor shall commence, on the first day of February in each year, during his continuance in office, and go through all parts of the county, or subdivision of the county, in which he is the assessor, and require every person who shall have owned, or shall have had the charge or management of any property on the said first day of February in each year, taxable by law, except merchandise, and being within the county, to deliver him a written list of the same," etc.

In the previous article it had appeared what property was subject to taxation, and the rate of the annual tax. The section above quoted appears to fix definitely that the tax should be assessed against the person who was on the first day of February the owner of the property, thus fixing his liability on that day, and charging the property with it as an encumbrance (although the amount of the encumbrance is not ascertained until afterwards). The defendant, having conveyed the land on the eleventh day of February, was liable for the taxes assessed against the property on the first day of that month.

As to the city taxes, the agreed case does not show at what time they became chargeable upon the property, and in respect to them we cannot, therefore, say that any error was committed in the lower court. The agreed case excludes the consideration of all other questions.

The judgment in the lower court, having been for nominal damages only, will be reversed, and judgment will be given here for the state and county taxes and interest.

BAY and DRYDEN, JJ., concurred.

THE PRINCIPAL CASE IS CITED and followed in *McLaren v. Sheble*, 45 Mo. 130, where it is held that state and county taxes are a lien on real estate from and after the first Monday in September, and the then owner will be liable to a subsequent purchaser for them on his covenant of warranty, even though the sale is prior to the assessment.

SCULLY v. MURRAY.

[84 MISSOURI, 420.]

PAROL LEASE FOR YEARS AT RENT PAYABLE MONTHLY FOLLOWED BY OCCUPANCY and payment of rent creates tenancy from year to year; and the monthly payment of rent will not constitute it a tenancy from month to month so as to authorize the tenant to terminate the lease at the end of any month without notice; nor will the breach of a promise to give a written lease alter the relations of the parties in respect to the nature of the tenancy.

ACTION for rent. The opinion states the case.

Hume, and Davis and Evans, for the appellant.

A. M. and S. H. Gardner, for the respondent.

By Court, BATES, J. This suit was brought to recover the rent of a house for one month. Plaintiff, by parol, rented a house to defendant for six years, at a rent payable monthly. This lease being followed by occupancy and the payment of rent, though declared by the statute of frauds to create only a tenancy at will, has the effect of creating a tenancy from year to year: *Kerr v. Clark*, 19 Mo. 132; *Taylor's Landlord and Tenant*, sec. 70.

The defendant left the house and tendered the key to the plaintiff, which he refused; and this suit is for the rent for one month after the defendant had left the house. The defendant gave evidence tending to prove that he entered into possession under a verbal contract for a written lease, and that the plaintiff refused to execute the lease, and the defendant asked the following instruction, which was refused: "If Murray entered into possession of the premises under a verbal contract for a written lease for six years, the rent to be paid monthly, and Scully refused to execute the written lease, and Murray continued in possession, paying rent from month to month, a tenancy from month to month was thereby created, commencing from the time of entry, and Murray had a right to leave at the end of any month without giving written notice of said intention."

It is not perceived how the promise to give a written lease, and the breach of that promise, can alter the relations of the parties in respect to the nature of the tenancy; and the continued occupation by the tenant, and payment of rent by him, continued the same relation of landlord and tenant between the parties. Nor is it perceived that the monthly payment of rent constituted it a tenancy from month to month (any more than

the quarterly payment of rent would create a tenancy from quarter to quarter) so as to authorize the tenant to terminate the lease at the end of any month without notice. In the case of *Anderson v. Prindle*, 23 Wend. 616, the court of error of New York, in a case very similar to the present one, held the tenancy to be from month to month; but that case is thought to be in conflict with the case of *Kerr v. Clark*, 19 Mo. 182, above cited, decided by this court, as well as with other New York and English cases.

Judgment affirmed.

BAY and DRYDEN, JJ., concurred.

TENANCY FROM YEAR TO YEAR IS SPECIES OF TERM FOR YEARS, from which it is distinguished by the fact that the duration of the term is not limited; and it is distinguished from a tenancy at will by the mode of determination, the tenancy from year to year being terminated by notice to quit, while the tenancy at will terminated, at most, only by demand of possession: *Kitchin v. Pridgen*, 64 Am. Dec. 593, and note 596. And a tenant from year to year cannot at any time during the year, at pleasure, surrender the premises against the landlord's consent, and thus excuse himself from paying rent: *Barlow v. Wainwright*, 52 Id. 79.

STATE v. WOHLMAN.

[34 MISSOURI, 432.]

FACT THAT PART OF STOLEN PROPERTY WAS FOUND UPON PERSON OF ONE engaged in the common design, aiding and abetting the defendant, is competent evidence on the trial of an indictment for larceny.

INDICTMENT for larceny. The opinion states the case.

Voullaire, for the respondent.

Davis and Evans, for the appellant.

By Court, BAY, J. The record in this case presents no point which would justify this court in interfering with the judgment below; the defendant and Augusta Goetz and Catharine Martin were indicted for stealing various articles of jewelry from the store of Eugene Jaccard, in the city of St. Louis, on the 7th of November, 1861. The defendant asked for and obtained a severance, whereupon Goetz and Martin were put upon their trial and convicted; but at the March term, 1863, of this court, the judgment was reversed and a new trial

awarded, upon the ground that the criminal court permitted the state to introduce evidence of other larcenies than those charged in the indictment, committed at other places and upon the property of other persons. Upon the trial of the defendant, however, no such evidence was offered by the prosecution, and in this respect the case differs materially from that of Goetz and Martin.

It is contended on the part of the defendant that the court erred in admitting evidence of the search of Goetz, the husband of one of the defendants. It seems from the evidence that he was not in the store at the time the property was taken, but joined the women soon after they left the store, and was arrested and conducted to the police station with them when they were searched, and upon his person was found a lot of gold chains, identified as part of the property taken from Jaccard's store. It was also shown that upon the way to the police station they dropped upon the sidewalk several articles of jewelry, and manifested much anxiety to get rid of the jewelry about their persons. Upon the supposition that they were engaged in a common design, aiding and abetting each other, which fact the evidence tended to prove, and in view of the fact that the husband of Mrs. Goetz was found communicating with the women before their arrest, and endeavored to prevent their arrest, we think it was perfectly competent for the state to show that a part of the stolen property was found in his possession.

The other judges concurring, the judgment of the criminal court will be affirmed.

ACTS AND DECLARATIONS OF ACCOMPLICES are evidence against each other: *Johnson v. State*, 65 Am. Dec. 383, and note 386.

ALEXANDER v. HICKOX.

[34 MISSOURI, 496.]

NO ALTERATION OF DEED AFTER TITLE HAS PASSED THEREUNDER, by whomsoever made or with whatever purpose, can revert the grantor with title. REGISTER'S DEED UPON SALE OF LAND FOR TAXES MAY BE PROPERLY REJECTED as evidence for uncertainty of description; notwithstanding the statute makes it *prima facie* evidence of title in the purchaser.

ACTION in the nature of ejectment. The appellants claimed *inter alia* that the register's deed should have been admitted

by virtue of the statutes making such deeds *prima facie* evidence of title in the purchaser whenever the title to the land sold should be brought in question, and declaring that such deeds so executed and recorded should, without any further proof, be received in evidence. The respondents claimed that the deed was void for uncertainty. In other respects the opinion states the case.

Krum and Decker, for the appellants.

Glover and Shepley, for the respondents.

By Court, BATES, J. This is an action in the nature of ejectment for a lot in the city of St. Louis. Both parties claim under Thomas Barnett. In 1832 Barnett by deed conveyed the lot to Orme and Thomas; afterwards the name of Thomas was erased from the deed; and still subsequently Thomas conveyed his interest in the lot to Orme, who conveyed the whole to the plaintiffs.

In 1846 a sheriff's sale of Barnett's interest in the lot was made to McDonald, who conveyed to Willi, one of the defendants.

At the request of the plaintiffs the court instructed the jury, —

“That the sale of the sheriff of St. Louis County to James McDonald, and the deed of said sheriff to said McDonald for the land so sold, given in evidence by defendants, conveyed no title to said McDonald for any portion of the land described in the deed of Thomas Barnett dated the twenty-third day of May, 1832, given in evidence by plaintiffs.”

There was no error in this instruction. Barnett's title having passed by his deed to Orme and Thomas, no subsequent alteration of the deed (by whomsoever made or with whatever purpose) could revest Barnett with the title, and there was, therefore, nothing upon which the sheriff's deed could operate: *Tibbeau v. Tibbeau*, 19 Mo. 81 [59 Am. Dec. 329].

2. The defendant also offered in evidence a deed of the register of lands upon a sale of the lot made for taxes. Objection having been made to the uncertainty of the description, the defendant gave the testimony of a witness to explain the description, and upon objection made by the plaintiff the deed was still rejected.

The deed was a printed form, obviously intended for the conveyance of country lands. It contained columns with

printed headings, under which were written words of description as follows:—

Towhom assessed.	Acres.	1-100.	Parts of sec. No. survey.	Sec.	Town.	Range.	Local Description.
Arch. E. Orme.	BL 126	Sixth.	18 by 60 ft.	N. Wash. Av.	E. 6th. St.	S. Willi	W. Swon in City. of St. Louis.

The testimony was as follows:—

One Denis testified: "I am a practical surveyor; I know the location of the land in suit; I surveyed the land adjoining it formerly owned by Swon, now the property of Walker." The deed from the register in the state of Missouri to Willi being shown witness, he states: "I could not locate the land from the description in this deed; I would need more information to locate it; I would go to the corner of Sixth Street and Washington Avenue. Lot No. 126 is on the south side of Washington Avenue; the land mentioned in the petition is in the same block; I would, from the register's deed, locate the land in question at the corner of Sixth Street and Washington Avenue. The lot referred to as belonging to Walker adjoins it on the west." On cross-examination the witness stated that "if the printed headings in the deed of the state register are used as a part of the deed, there is no sense in it."

If the description contained in the deed were such as could be explained by parol testimony, it is obvious that the testimony of this witness did not at all give it any greater certainty. He truly said that if the printed headings in the deed are used as a part of the deed there is no sense in it; and it is equally true that if the printed headings be entirely disregarded there is no sense in it. There is, in truth, no description at all of any lot whatever.

The court properly rejected the deed.

Judgment affirmed.

BAY and DRYDEN, JJ., concurred.

ALTERATION OR DESTRUCTION OF DEED AFTER TITLE HAS PASSED does not divest title of grantee: *Van Hook v. Simmons*, 78 Am. Dec. 573, and cases cited in the note 574. The principal case is cited to the point that an alteration in a deed after delivery does not operate to reconvey the title to the original grantor. The title passes by the deed, and its continued existence or integrity is not essential to the title, although a fraudulent and material change may disable the holder from bringing an action upon its covenants: *Woods v. Hilderbrand*, 46 Mo. 286; *Robbins v. Magee*, 76 Ind. 393; *North v. Henneberry*, 44 Wis. 321.

TAX TITLE DEED WILL BE HELD VOID where description is so uncertain and incomplete as to require the aid of extrinsic evidence to determine the boundaries therein mentioned: *Wofford v. McKenna*, 76 Am. Dec. 53, and note 57. Statutes making tax deed *prima facie* evidence of title: See note to *People v. Seymour*, 76 Id. 532.

STATE v. McCoy.

[94 MISSOURI, 381.]

IT IS PRESUMED THAT PERSON INDICTED FOR CRIME IS SANE, and the burden is upon him to rebut the presumption by proof that will satisfy the jury that he was at the time incapable of distinguishing between right and wrong.

PREPONDERANCE OF EVIDENCE IN FAVOR OF INSANITY OF PRISONER will authorize an acquittal; a mere doubt of his sanity is not sufficient.

INDICTMENT for murder. The opinion states the case.

Jecko, Gantt, and Johnson, for the appellant.

Voullaire, for the respondent.

By Court, **BAY, J.** At the May term, 1863, of the St. Louis criminal court, the defendant was indicted for the murder of Catharine Moran, alleged to have been committed on the 20th of April, 1863. Upon the trial the killing was admitted, and the plea of insanity set up by the prisoner's counsel. Being convicted of murder in the first degree, a motion was made for a new trial, which was overruled, and the defendant now appeals to this court. The main ground relied upon by defendant's counsel for a reversal of the judgment is the giving by the court below of the second, third, and thirteenth instructions, which are as follows:—

“The law presumes every man who has arrived at the years of discretion to be sane, and capable of committing crime, until the contrary is shown; so that the state, after proving the unlawful act, need offer no evidence whatever of the sanity of the defendant, but may rest upon the legal presumption of sanity until the defendant shows the contrary.

“This defense of insanity is emphatically one which the defendant must make out, and it must be made out to the satisfaction of your minds; for if the evidence merely shows a case of doubt when the defendant might not be insane, this is not sufficient to authorize an acquittal on that ground only. If the evidence shows merely that the defendant might have been insane at the time of the commission of the act, but does

not show satisfactorily to your minds that defendant was insane at that time, this is not sufficient to warrant an acquittal.

"The jury are instructed that the *onus* or burden of proof of defendant's insanity at the immediate time of the killing rests upon the defendant; and if the same be not established to the entire satisfaction of the jury, then they will find her guilty of murder in the first degree."

The theory of the defense, as urged in this court and shown in the instructions asked and refused, is, that it is incumbent upon the state to show by positive and affirmative testimony that the defendant was sane at the time of the killing; and if the jury entertain a doubt as to the sanity or insanity of the prisoner at such time, the jury must give her the benefit of such doubt and acquit her.

It is true that it is incumbent upon the state to prove every fact necessary to constitute the crime of murder, which necessarily includes the sanity of the prisoner; but the burden of proving such sanity is fully met by the presumption of law that every person is of sound mind until the contrary appears; and he who undertakes to escape the penalty of the law by means of the plea of insanity must rebut such presumption by proof entirely satisfactory to the jury. It is a defense to be made out by the prisoner, and by proof that will satisfy the jury that he was incapable of distinguishing between right and wrong.

In *Bellingham's Case*, Dyer, 20, which was an indictment for murder, the defense set up was insanity, and Mansfield, C. J., in charging the jury, told them "that in order to support such a defense it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong; that in fact it must be proved beyond all doubt that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature, and that there was no other proof of insanity which would excuse murder or any other crime."

This doctrine, founded in reason, has been fully recognized by the courts of this country.

The idea, therefore, advanced by the prisoner's counsel, that it is incumbent upon the state to prove that the accused was sane at the time she committed the act, by evidence in addition to and independent of the presumption of law above referred to, is not sustained by authority.

The first instruction asked by defendant and refused, required the jury to acquit if they entertained a doubt as to the sanity or insanity of the defendant at the time of the commission of the homicide.

The doctrine of this instruction was repudiated by this court in the case of the *State v. Huting*, 21 Mo. 464, and very properly, for it virtually requires the jury to acquit if they entertain a doubt as to whether the defendant has succeeded in maintaining the defense. The true rule, in our opinion, was laid down by C. J. Shaw, in *Commonwealth v. Rogers*, 7 Met. 500 [41 Am. Dec. 458], which was a case of murder, and the defense insanity. The jury received a very elaborate charge from the learned judge, and after being in consultation several hours, came into court, and asked the opinion of the court upon the following question: "Must the jury be satisfied beyond a doubt of the insanity of the prisoner to entitle him to an acquittal?" To which the chief justice replied, "that if the preponderance of the evidence was in favor of the insanity of the prisoner, the jury would be authorized to find him insane."

The second, third, and fourth instructions asked by defendant are embraced in those given by the court, and it was unnecessary, therefore, to give them again.

As no other ground of error has been suggested, the judgment of the criminal court will be affirmed.

The other judges concurred.

BURDEN AND SUFFICIENCY OF PROOF WHERE INSANITY IS SET UP AS DEFENSE TO CRIME: See *People v. McCann*, 69 Am. Dec. 643, and note 650; *Heppes v. People*, 83 Id. 231; *Scott v. Commonwealth*, 83 Id. 461. The principal case is cited to the point that the burden of establishing the insanity of the accused affirmatively to the satisfaction of the jury rests upon the defense. It is not necessary, however, that this defense be established beyond a reasonable doubt; it is sufficient if the jury is reasonably satisfied by the weight or preponderance of the evidence that the accused was insane at the time of the commission of the act: *State v. Klinger*, 43 Mo. 132; *State v. Hundley*, 46 Id. 417; *State v. Redeemer*, 71 Id. 176; S. C., 8 Mo. App. 10; *State v. Hoyt*, 47 Conn. 541.

FIELD v. SANDERSON.

[24 MISSOURI, 542.]

IT IS NOT GOOD GROUND FOR CONTINUANCE OF SUIT ON FOREIGN JUDGMENT that execution has been issued thereon and levied on lands of the defendant in the foreign jurisdiction, and that the lands have been advertised for sale, as this shows no present defense to the action.

DEFENDANT IN ACTION ON JUDGMENT CANNOT, UNDER AVERMENT THAT JUDGMENT WAS PROCURED BY FRAUD, reopen the issues determined by that judgment, and introduce evidence to impeach that given at the trial. The judgment is conclusive as to matters in issue.

ACTION upon a judgment. The opinion states the case.

Whittlesey, for the appellant.

Lackland, Cline, and Jamison, for the respondents.

By Court, **BATES, J.** This is a suit upon the record of a judgment rendered by a court in Wisconsin, against the defendant, and in favor of one Keep, who assigned it to the plaintiffs.

When the case was called for trial, the defendant filed an affidavit, in which he stated that the plaintiffs were both insolvent; that an execution upon the judgment had been issued by the court in Wisconsin which had rendered the judgment, which execution had been levied upon lands of the defendant in Wisconsin (worth in ordinary times five thousand dollars), and the lands were advertised for sale under the execution, at a day then in the future.

For the reasons stated in the affidavit, the defendant moved for a continuance of the cause, and for leave to plead, in part satisfaction of the judgment, the payment of such sums of money as might be made upon said execution and levy, when the sale by the sheriff shall have been made. The court overruled the motion, and the defendant excepted.

There was no error in this action of the court. The matters stated in the affidavit showed no present defense to the action, and it would have been improper to continue the cause to await the result of proceedings elsewhere, which might or might not so result as to entitle the defendant to a credit upon his indebtedness established by the judgment.

The defendant's answer contained an averment that the judgment in Wisconsin was obtained by the fraud and covin of said Keep and others in collusion with him.

To support that averment the defendant offered some testi-

mony at the trial, which, upon objection by the plaintiffs, was ruled out by the court, and this ruling by the court is assigned for error. The testimony offered was the bill of exceptions, showing the testimony given at the trial of the case in Wisconsin, and the depositions of witnesses to show that the facts were different from what they appeared to be by the bill of exceptions, and also to show that a witness whose testimony is contained in the bill of exceptions had made statements to defendant's attorney different from and conflicting with those which he made as a witness at the trial.

The judgment, of course, concludes the parties as to the matters in issue in the cause in which it was rendered, and it is only claimed that the testimony should have been admitted in evidence to establish that the judgment was obtained by fraud, and this supposed fact it does not tend to establish. It may well be that the judgment was rendered under a mistake as to the facts, and that a witness swore falsely (and it is impossible to know what credit was given to his testimony), but this does not tend to establish that the judgment was obtained by fraud. These facts may be entirely consistent with the most perfect good faith of the plaintiffs, and may, indeed, be the result of the negligence of the defendant himself in failing to produce testimony of the truth.

Nor can it now be determined whether the false testimony was material to the issues tried. The defendant cannot, by averring that the judgment was procured by fraud, reopen the issues determined by that judgment, and give testimony to impeach that given at the trial.

The testimony here offered was incompetent to establish that the judgment was procured by fraud, and was properly excluded.

The judgment is affirmed.

BAY and DRYDEN, JJ., concurred.

CONTINUANCES OF CIVIL CAUSES, WHEN PARTIES ARE ENTITLED TO: This subject is treated in the note to *Stevenson v. Sherwood*, 74 Am. Dec. 141-151.

FOREIGN JUDGMENT, DULY PROVEN, IS CONCLUSIVE between the parties, unless obtained by fraud: *Lanier v. Wescott*, 82 Am. Dec. 404, and note. A judgment is conclusive upon matters actually determined: *Grassmeyer v. Benson*, 70 Id. 309, note 313; *Mills v. Clarke*, 70 Id. 603, note 605.

CABLE v. GATY.

[34 MISSOURI, 573.]

JUDGMENT AGAINST CORPORATION FOR DAMAGES FOR LOSS OF STEAMBOAT through the negligence of its agents is not a debt of the corporation for which the directors are personally liable under the statute providing that in case of any excess of the amount of the debts of a corporation over the amount of its capital stock actually paid in, the directors shall be jointly and severally liable to the extent of such excess.

ACTION to subject the defendants to personal liability as directors of the St. Louis Marine Railway and Dock Company, a corporation, for the payment of a judgment recovered against the company for damages for the loss of a steamboat which the company undertook to raise from the water and repair, but which was destroyed and lost through the negligence of the company's agents and servants. The cause of action is the same as in the case of *Cable v. McCune*, 26 Mo. 371; S. C., 72 Am. Dec. 214.

C. D. Drake, for the plaintiffs in error.

Gantt, Glover, and Shepley, and Sharp and Broadhead, for the defendants in error.

By Court, **BATES, J.** This was a suit to subject the defendants to personal liability as directors of the St. Louis Marine Railway and Dock Company, a corporation chartered in 1849, upon the allegation that the debts of the corporation exceeded the amount of stock paid in.

The plaintiffs' claim against the corporation is the same which is described in the case of *Cable v. McCune*, 26 Mo. 371 [72 Am. Dec. 214], in which the same plaintiffs sought to subject the defendants to personal liability as stockholders; and the first question presented is, whether the demand of the plaintiffs is a debt of the corporation within the meaning of the section of the act under which it is sought to hold the defendants liable.

The section is as follows: "The whole amount of the debts of any corporation hereafter created (except banking companies) shall not exceed the amount of its capital stock actually paid in, and in case of any excess, the directors under whose administration it shall happen shall be jointly and severally liable, to the extent of such excess, for all the debts of the company then existing, and for all that shall be contracted so long as they shall respectively continue in office,

and until the debts shall be reduced to the said amount of the capital stock; provided, that any of the directors who shall be absent at the time of contracting any debt contrary to the foregoing provisions, or who shall object thereto, may exempt themselves from the said liability by forthwith giving notice of the fact to the stockholders, at a meeting which they may call for that purpose."

It is very clear, from the language and obvious purpose of the section, that the debts which must exceed in amount the capital stock paid in to subject the directors to liability must be debts voluntarily created by them or under their authority; but assuming that an excess in amount of such undoubted debts exists, it becomes necessary to determine whether the directors are personally liable for demands against the company of the character of the plaintiffs.

The language of the section seems to apply only to one kind of liabilities of the corporation, and to make the directors liable to pay the same debts which constitute debts of the company in excess of the capital stock paid in, and no other. The claim of the plaintiffs is not a debt voluntarily created by the directors or under their authority, and is excluded by its character from the number of those for which the directors may be personally liable.

The construction given by this court to the previous section of the act, as to the liability of stockholders for debts, seems equally applicable to this section: *Cable v. McCune*, 26 Mo. 371 [72 Am. Dec. 214].

The lower court having decided that the plaintiffs could not recover, and the above view of this case taken by this court sustaining that decision, it is unnecessary to examine the other questions presented by the record.

Judgment affirmed.

BAY and DRYDEN, JJ., concurred.

JUDGMENT AGAINST CORPORATION FOR DAMAGES CAUSED BY NEGLIGENCE OF ITS AGENTS is not a "debt" of the corporation for which the stockholders are jointly and severally liable: *Cable v. McCune*, 72 Am. Dec. 214, where the plaintiff and the cause of action were the same as in the principal case, but the defendants were individual stockholders. Liability of stockholders for the debts of a corporation: See *Commercial Bank v. Steam Factory*, 75 Id. 688, and note 701. Liabilities of directors of corporations: See extensive note to *Hodges v. New England Screw Co.*, 53 Id. 637-651.

OHIO AND MISSISSIPPI R. R. Co. v. McPHERSON.

[35 MISSOURI, 12.]

ACCEPTANCE OF CHARTER OF CORPORATION, IF ANY IS NECESSARY where the charter creates a corporation *in present*, and appoints a board of directors, is sufficiently shown by the meeting and proceedings of the directors under the charter, though had without the limits of the state creating the corporation.

STOCKHOLDER OF CORPORATION WHOSE DIRECTORS, NAMED IN CHARTER, HAVE MET AND TAKEN ACTION without the limits of the state creating the corporation, is estopped from denying its corporate existence, where he has subscribed for its stock by its corporate name, paid installments called for by the directors, and attended the meetings of its stockholders and voted at elections.

DIRECTORS OF CORPORATION WHICH HAS BEEN DULY PUT INTO EXISTENCE who are elected at a meeting of the stockholders held without the limits of the state creating the corporation, but who accept their offices, and order a call for payment upon subscriptions to stock, become directors *de facto*, and their authority to act as such cannot be questioned collaterally by a stockholder in an action against him for the call thus made without showing a judgment of ouster against them in a direct proceeding by the government for that purpose.

ACTION upon a subscription to corporate stock. The opinion states the case.

J. R. Shepley, for the appellant.

S. T. Glover and W. Homes, for the respondent.

By Court, DRYDEN, J. This suit was commenced the 28th of November, 1858, and was for the recovery of fourteen hundred dollars and interest, being a balance of the larger sum of two thousand dollars, subscribed by the appellant on the 28th of March, 1851, to the capital stock of the Ohio and Mississippi Railroad Company, the respondent. There seems to be no dispute about the facts in the case, but about the law arising upon them. The facts as disclosed by the record, so far as are material to the questions arising, are as follows:—

The plaintiff was incorporated by an act of the legislature of the state of Illinois, approved February 12, 1851; by the first section of which the persons named therein, “and such other persons as might associate with them for that purpose, are hereby [were thereby] made and constituted a body corporate and politic, by the name and style of the Ohio and Mississippi Railroad Company, with perpetual succession,” etc. The purpose of the corporation was the construction and operation of a railroad, commencing at Illinoistown, on the east bank of the Mississippi, running thence to the east line of the said state in

the direction of the city of Vincennes, in the state of Indiana. The act of incorporation vested the corporate powers of the company in a board of directors, to consist of not less than seven nor more than seventeen in number, and such other officers, agents, and servants as they should appoint; and named the first board, consisting of thirteen persons, who, by the provisions of the act, were to hold their offices until their successors should be elected and qualified; and provided that vacancies in the board might be filled by a vote of two thirds of the directors remaining, the appointees to continue in office until the next regular annual election of directors, which was required to be held on the first Monday of September in each year, at such place as the directors might appoint. A meeting of the board appointed in the charter was held in the city of St. Louis, Missouri, on the 28th of March, 1851, at which certain rules and regulations as to the rights and duties of stockholders (not necessary to be detailed here) were adopted, and a form of obligation was prescribed to be signed by subscribers for stock in the company. The following is the form of obligation thus prescribed, and is the same which was subscribed by the defendant, and on which this suit was brought, viz.:—

“We, whose names are subscribed hereto, do promise to pay to the Ohio and Mississippi Railroad Company, incorporated by the state of Illinois, the sum of fifty dollars for every share of stock set opposite to our names respectively, in such manner and proportions and times as shall be determined by such company in pursuance of the charter thereof and of the preceding resolutions of the board of directors. Witness the — day of —, A. D. 18—.

“Shares of fifty dollars (\$50) each. John O’Fallon, 1,000 shares; P. Chouteau, Jr., & Co., 200; George Collier, 50; Wm. M. Morrison, 50; John Tilden, 10; Henry Chouteau, 20; Wiggins Ferry Company, by the several proprietors, 400; Chambers and Knapp, 40; A. J. P. Garesché, 10; L. M. Kennett, 40; C. P. Chouteau, 40; Adolphus Meier & Co., 20; Bridge & Brother, 20; Joseph Charless, 20; E. W. Clark & Bros., 40; John Smith, 10; John J. Anderson, 10; Wm. M. Pherson, 40” (and others).

Four calls for payment of subscriptions to stock were ordered by the board, all at meetings of the board in the city of St. Louis; the first on the 25th of September, 1851, for two and a half per cent; the second on the 19th of November, 1851, for seven and a half per cent; the third on the 5th of August,

1852, for thirty per cent; and the fourth on the 12th of August, 1853, for the remainder (sixty per cent), to be paid in installments of five per cent on and after the 1st of October, 1853, till fully paid; of which several calls the appellant had due notice. At the meetings of the board at which the first and third calls were ordered, there were present six of the thirteen members appointed in the charter, with, in one instance one, and in another two, appointees of the charter members; the second call was ordered by a meeting of seven of the charter members and two of their appointees; the fourth call was ordered by a meeting of directors, elected at a stockholders' election held in the city of St. Louis on the 6th of September, 1852,—none of the directors in this meeting being charter directors. The appellant paid to the respondent on his liability arising upon his said subscription, on the 22d of March, 1852, the sum of one hundred dollars, and on the 3d of September, 1853, the further sum of five hundred dollars; and in an interview had between the defendant and the treasurer of the company on the subject of the appellant's said liability after the year 1855, and after the completion of the road, he admitted his liability and expressed his willingness to pay when called on. A meeting of the stockholders of the company was held in St. Louis on the 4th of September, 1854, in the proceedings of which the appellant participated, voting with the majority in the adoption of measures looking to the accomplishment of the objects of the corporation. The avails of stock sold were used in building the road, and the road was completed on the 30th of June, 1855.

A recovery in the case was resisted on two grounds: first, that the facts were insufficient to show an acceptance of the charter, and therefore the plaintiff was not shown to have any corporate existence; secondly and mainly, that the votes and proceedings of the stockholders and directors when assembled in St. Louis, beyond the bounds of the state granting the respondent's charter, were wholly void, and therefore that the calls which were ordered in St. Louis, and in one instance by a board elected in St. Louis, were invalid, and imposed no obligation on the appellant to respect them.

1. As to the corporate existence of the respondent: It is maintained by the counsel for the appellant, that no acts of the board of directors performed beyond the territorial limits of the state from which the charter emanated could be a valid acceptance of the charter. In support of this position, reliance

is had chiefly on *Miller v. Ewer*, 27 Me. 509 [46 Am. Dec. 619]; that was a writ of entry for a tract of land, in which the demandants derived their title from the Bluehill Granite Company, incorporated by an act of the Maine legislature. On the trial it appeared that the meeting of the corporators was called for the organization of the corporation under its charter in the city of New York, and that the charter was there accepted and the officers of the corporation (president, directors, and secretary) were chosen. At a meeting of the directors thus elected, held in the city of New York, a resolution was adopted directing the president and secretary to execute the conveyance, under which the demandants claimed title. There was no proof that any meeting for the organization of the company or for the choice of its officers had ever been holden in the state of Maine; but there was proof that the company, by a person acting as its agent, transacted business in the state. The question involved in the case involved the validity or invalidity of the conveyance thus made by the president and secretary in behalf of the company. The court decided it was void, but placed its decision, not on the ground that the board of directors ordering the execution of the conveyance met at a wrong place, but alone on the ground that the election of the directors by the stockholders having been held outside of the state, and because held out of the state was void, and gave the directors thus chosen no legal authority to convey or to direct the conveyance of the corporate property. The opinion in the case, while it denies extraterritorial power to corporators, concedes it to directors. The court says: "The directors of a corporation are not a corporate body; they are, when acting as a board, but a board of officers or agents, and they may exercise their powers as agents beyond the bounds where the corporation exists." In the present case the charter created a corporation *in præsenti*, and appointed a board of directors without the necessity of any action on the part of the corporators; and if any assent was necessary to infuse life into this body politic, the proceedings of these directors, although had beyond the bounds and limits of the state of Illinois, were, according to the authority quoted, a sufficient expression of that assent.

But aside from the question whether the action of the board of directors beyond the bounds of the state was a sufficient expression of assent to give vitality to the corporation, the appellant's position towards the respondent is such as ought to

preclude him from denying its corporate existence. The case of the *Dutchess Cotton Manufacturing Co. v. Davis*, 14 Johns. 238 [7 Am. Dec. 459], was a suit on a promise to pay the price of stock subscribed by the defendant. The court, on the authority of *Henriques v. Dutch West India Co.*, 2 Ld. Raym. 1535, held that the defendant, having entered into a contract with the plaintiffs in their corporate name, thereby admitted them to be duly constituted a body politic and corporate.

The appellant having contracted with the respondent in its corporate name, paid his money to it as an existing, living thing in answer to its corporate demands, and from year to year having attended meetings of its stockholders and voted at elections and upon questions which clearly implied the respondent's existence, he ought to be estopped from denying what he has thus often and so solemnly admitted: *All Saints Church v. Lovett*, 1 Hall, 191; *John v. Farmers' and Mechanics' Bank of Indiana*, 2 Blackf. 367 [20 Am. Dec. 119]; *Chester Glass Co. v. Dewey*, 16 Mass. 94 [8 Am. Dec. 128].

2. As to the invalidity of the calls: In the examination of the case under the first objection urged to the respondent's right to recover, I think I have shown that the first three calls, as they were ordered by the directors, the validity of whose appointment was not controverted, were subject to no valid objection, although ordered by the board when in session beyond the territorial limits of Illinois. But the alleged invalidity of the fourth call rests upon a total denial of official authority in those who ordered it. This call, as has been seen, was ordered by a board chosen by the stockholders of the company at an election in the city of St. Louis; and it is insisted, on the authority of the case of *Miller v. Ewer*, 27 Me. 509 [46 Am. Dec. 619], already cited, that this election, by reason of the place where it was held, was a nullity, conferring no authority whatever on the persons chosen. I am not disposed to question the soundness of that decision in its application to the facts of that case, but I am unwilling to extend the principle there laid down to a case materially differing in its circumstances, as I think the one under consideration does. In that case, at the time the obnoxious election was held, the corporation had no existence,—it had not yet come into being and there being neither corporators nor corporation, no valid official authority could be communicated by such election; but in this case, at the time the election occurred to which objection is made, the corporation was, and for more than a

year had been in full life, exercising all the functions and franchises contemplated by its charter. After the corporation had become full fledged, I see nothing in reason or in principle why the stockholders might not as well elect directors as the directors a treasurer on the Missouri side of the line. The utmost that could be said under such circumstances is, that the election was irregular.

The corporation having been once put into existence, if the members of the board of directors—whether charter members, or their appointees, or those elected by the stockholders in St. Louis—accepted their offices and acted under their appointment or election, as the evidence shows was the case, they became directors *de facto*, and their authority to act in behalf of the corporation could not be questioned by the appellant in this, a collateral suit, without showing a judgment of ouster against them in a direct proceeding by the government for that purpose: *Trust of Vernon Soc. v. Hills*, 6 Cow. 23; *All Saints Church v. Lovett*, 1 Hall, 198, 199; *John v. Farmers' and Mechanics' Bank of Indiana*, 2 Blackf. 367 [20 Am. Dec 119]; Angell and Ames on Corporations, 3d ed., 104, 105.

I find no error in the record. Let the judgment be affirmed.

BAY, J., concurred.

BATES, J., filed a dissenting opinion.

ESTOPPEL OF SUBSCRIBER TO CORPORATE STOCK to deny corporate existence: See note to *Parker v. Thomas*, 81 Am. Dec. 402; *Snyder v. Studebaker*, 81 Id. 415; note to *Commonwealth v. Cullen*, 53 Id. 467-469. The principal case is cited to the point that where a person participates in all the proceedings in creating a corporation and in increasing its stock and making the calls on the stock subscriptions both as stockholder and director, in a suit against him to compel payment of such calls, he is estopped to deny their validity: *Kansas City Hotel v. Harris*, 51 Mo. 464; *State v. Milwaukee etc. R'y Co.*, 45 Wis. 599.

ACCEPTANCE OF CHARTER FROM EXERCISE OF CORPORATE POWERS THEREUNDER: *Penobscot Boom Corp. v. Lamson*, 33 Am. Dec. 656; *Commonwealth v. Cullen*, 53 Id. 450, and note 467-469, where this subject is treated.

PERSONS ACTING PUBLICLY AS OFFICERS OF CORPORATION are presumed to be rightfully in office; and in the absence of proof on the subject, it is not incumbent on the party claiming under the acts of an officer *de facto* to show that he has been properly elected: *Susquehanna etc. Co. v. Insurance Co.*, 56 Am. Dec. 740; *Selma etc. R. R. v. Tipton*, 39 Id. 344.

VOTES AND PROCEEDINGS OF PERSONS PROFESSING TO ACT IN CAPACITY OF CORPORATORS when assembled without the bounds of the sovereignty granting the charter are wholly void: *Miller v. Ewer*, 46 Am. Dec. 619, and note 627; *Commonwealth v. Milton*, 54 Id. 522; *Aspinwall v. Ohio and Missis-*

Missi R. R. Co., 83 Id. 329. Domicile of corporation: See *Railroad Company v. Gallahue's Adm'rs*, 65 Id. 254, and note 263, 264.

THE PRINCIPAL CASE IS CITED to the point that the trustees or directors of a savings bank are to be treated as the agents of the bank; and for any misfeasance or non-feasance causing damage to the bank they are responsible to it upon the same principle that any agent is, for like cause, responsible to his principal: *Hun v. Cary*, 82 N. Y. 79.

PICOT v. BIDDLE'S EXECUTOR.

[85 MISSOURI, 29.]

ANNUAL SETTLEMENTS OF EXECUTORS AND ADMINISTRATORS ARE NOT CONCLUSIVE upon the parties interested in the estate; and at the final settlement they may show errors in the previous annual settlements, which may be corrected by the probate court.

APPLICATION by an executor for a final settlement of his accounts. The opinion states the case.

L. G. Picot, C. Gibson, and R. M. Field, for the plaintiff in error.

Krum and Decker, for the defendant in error.

By Court, BAY, J. In the early part of 1846 Ann Biddle died in the city of St. Louis, leaving a very large estate, which she disposed of by will. Louis G. Picot was appointed residuary legatee in trust for the infant children of Mrs. Harney, a sister of the testatrix, and John O'Fallon was made executor.

The executor accepted the appointment, and entered upon the discharge of his duties, and made nine annual settlements with the probate court of St. Louis County, and gave the statutory notice that at the September term, 1856, of said court, he would present his accounts for a final settlement, which he did; and Picot, the residuary legatee, appeared, and filed objections to his accounts, which objections had reference to matters embraced in the previous settlements. In this final settlement a balance was found against the executor of \$13,482.07, from which settlement Picot appealed to the circuit court. The circuit court appointed a referee, with instructions to examine into the settlement of 1856, and no other, thus precluding the referee from any inquiry or examination into any of the previous settlements. The order of reference in the form in which it was made was objected to, and a motion filed to set it aside, which being overruled, the appellant duly ex-

cepted. On the hearing before the referee the appellant offered in evidence the nine annual settlements, and proposed to show that in such settlements there were mistakes in calculation and omissions on the part of the executor to charge himself with property which came to his possession; also, that the executor had obtained exorbitant allowances and commissions; but the referee refused to hear the evidence, upon the ground that the order of the circuit court confined his examination to *the last settlement*. In due time the referee made his report, *which* the appellant moved to set aside. The court, however, overruled the motion, and gave judgment upon the report; to all of which the appellant duly excepted, and now brings the case to this court by writ of error. The record presents but one question for the consideration of this court, and that is, whether an annual settlement (preceding the final settlement of an executor or administrator) has the force and effect of a judgment precluding any inquiry into its correctness on a final settlement. The question is by no means void of difficulty, and the authorities upon the subject, both in England and this country, fall short of any satisfactory solution thereof, because of the variance between our statute and the statutes of other states, as well as England, respecting the administration of estates.

Under our law, every executor and administrator is required to exhibit a statement of the accounts of his administration for settlement, with proper vouchers, to the county court (or probate court), at its first term after the end of one year from the date of his letters, and at the corresponding term of such court every year thereafter until the administration be completed; and if at any time he desires to make a final settlement, he shall publish for four weeks in some newspaper in this state a notice to all creditors, and others interested in the estate, that he intends to make a final settlement at the next term of the court; and if it shall appear to the court that such notice has been duly published and that the estate of the deceased has been fully administered, the court is required to make a final settlement, to be conducted as annual settlements.

No such notice nor any notice whatever is required in reference to the annual settlements, and such settlements therefore are *ex parte*, and very rarely made in the presence of an heir, legatee, or party interested. This distinction between an annual and final settlement must be kept in view in order to

see the application of authorities to the question under consideration.

In England, all matters of probate and administration are vested in the ecclesiastical courts, and the jurisdiction is exercised by the bishop through an inferior tribunal called ordinary. There is no specified time for a settlement of the accounts of the executor, but he is under the exclusive control of the ordinary, who can cite him to make a settlement whenever and as often as he thinks proper; and in 2 Williams on Executors, 1777, it is stated that "the creditors and legatees, and all other parties having an interest, must be cited to be present at the making of the account, otherwise the account made in their absence will not bind them. Therefore the executor or administrator, when called upon by any one party to render an account, ought to cite the next of kin in special, and all others in general, having or pretending to have an interest in the goods of the deceased, to be present, if they think fit, at the rendering and passing of the account; and then, on their appearance, or contumacy in not appearing, the judges shall proceed, and the account thus determined will be final."

And on page 1778 it is further stated that, "after the investigation of the account, if the ordinary find it true and perfect, he shall pronounce for its validity; and in case all parties interested have been cited, such sentence shall be final, and the executor or administrator shall be subject to no further suit."

The English cases which undertake to interpret those statutes seem to regard a settlement made without notice to the parties as purely *ex parte*, and subject to correction and revision by the ordinary, upon good cause shown by any heir or legatee.

In Virginia, probate matters fall within the jurisdiction of the county courts, and settlements with executors and administrators are usually made with a commissioner, or auditor, appointed for that purpose by the court; and it has been universally held in that state that such settlements are not conclusive upon the parties, but are merely *prima facie* evidence of the correctness of the charges and credits, subject to be surcharged and falsified by any person interested: *Newton v. Poole*, 12 Leigh, 142.

The counsel for the appellant has furnished in his brief several leading cases from the Alabama reports which bear directly upon the question we are considering. In *Cunning-*

ham v. Poole, 9 Ala. 619, the supreme court says: "The mere fact that the guardian returned to the orphans' court from time to time a statement of the account between the ward and himself, the ordering of the same by the court to be recorded, and stating the balance upon the record according to the facts, is certainly not *res adjudicata*."

It does not preclude either party from showing an error in such returns, or estop the court when called upon to adjust the accounts upon final settlements from examining all the matters of debit and credit from the time the guardianship commenced, and rendering such decree as may be proper upon a view of all the facts. And in *Willis v. Willis*, 9 Ala. 330, it is stated by the court that "annual or partial settlements by an administrator or guardian are recognized by our laws, and may be absolutely necessary for the security of the administrator or guardian, as it would be most unreasonable that he should be required to keep an estate in his hands for many years without having his vouchers passed upon or his accounts settled. Such settlements when made according to law are *prima facie* to be considered correct, but may be impeached by proof showing their incorrectness." And in *Smith's Heirs v. Smith's Adm'r*, 13 Ala. 335, Collier, C. J., in delivering the opinion of the court says: "Partial settlements made by an administrator are not *res adjudicata*; either party may, upon final settlement, show an error in the accounts, and the court may examine all matters of debit and credit from the time the administration commenced, and render such decree as may be proper upon a view of all the facts."

The code of Alabama with reference to the administration law is, in its main features, similar to our own. It requires the administrator or executor to make annual settlements with the probate court; but he may make a final settlement at any time after eighteen months from the grant of letters if the debts are all paid and the condition of the estate in other respects will admit of it.

In New Jersey, it has been held by the supreme court, that "if by mistake, or other just and sufficient cause shown to the court, an omission has taken place in a partial account exhibited in the orphans' court by an administrator, such omission may be corrected, and just allowance be made to the administrator in his final account": *Liddel v. McVickar*, 11 N. J. L. 44 [19 Am. Dec. 369].

The supreme court of Texas ruled the same way in *Ingra-*

ham v. Rogers, 2 Tex. 467. In speaking of the duties of the probate judge, they say: "If the judge discovered at any time before final settlement with the administratrix that an item had been allowed improperly, it was not only competent but was his duty to make the correction. The allowance of the account was not *res adjudicata* until a final settlement."

The supreme court of Massachusetts, in several cases, held that a judge of probate had a right to open an account settled, for the purpose of correcting a mistake, and that such a right was necessary for the furtherance of justice, and ought not to be too strictly limited: *Stearns v. Stearns*, 1 Pick. 157; *Stetson v. Bass*, 9 Id. 30.

From the language employed by the judges it was not clear to what extent the account might be opened, whether simply for the correction of such errors and mistakes as were manifest upon the face of the settlements, or all errors that could be shown to exist, whether so manifest or not; and this no doubt led to the enactment by the legislature of a statute which provides: "When an account is settled in the absence of any person adversely interested, and without notice to him, the account may be opened on the application of such person at any time within six months thereafter; and upon every settlement of an account by an executor or administrator, all his former accounts may be so far opened as to correct any mistake or error therein, excepting that any matter in dispute between two parties which had been previously heard and determined by the court shall not be again brought in question by either of the same parties without leave of the court": R. S. Mass. 1836, p. 437.

In *Wiggin v. Swett*, 6 Met. 198 [39 Am. Dec. 716], the court held that it was competent for the probate court to re-examine the former accounts rendered by an executrix, and make corrections therein by charging back sums which were therein credited to her, or in any other way diminishing allowances made to her therein. Shaw, C. J., in delivering the opinion of the court, referred to the above-recited provision of the revised statutes of 1836, but stated that the law was substantially the same before the revised statutes.

From these cases and others which have fallen under our notice, it is clear that the weight of judicial authority in other states discountenances the idea that the annual settlement of an executor or administrator is conclusive, and has the force and effect of a judgment. But the learned counsel for the re-

spondent has referred us to several cases decided in this state, which we will examine in the order stated in his brief. The first is that of *Caldwell v. Lockridge*, 9 Mo. 358. Caldwell, as administrator of one Lockridge, made, upon due notice given, a final settlement of his administration of the estate, which left the estate indebted in a small amount to him. At a subsequent day of the same term of the court an order was made, without notice to Caldwell, disallowing certain commissions, the effect of which was to bring him in debt to the estate. The court held that it was not competent for the probate court to make such an order without notice to Caldwell, and Judge Scott, in delivering the opinion of the court, uses this language: "When an administrator makes his settlement, and a balance is found for or against him, that settlement has the force of a judgment." While this language is general, it is clear that the learned judge had reference to the final settlement, for no other settlement was in controversy; and in a subsequent opinion he says, "that though a court may have jurisdiction of a cause, yet a party not affected with notice of its proceedings is not bound by them."

The next case cited is that of *State ex rel. Collins v. Stevenson*, 12 Mo. 178, which was a suit on the official bond of the administratrix, who had made her final settlement. Upon the trial, the court, among others, gave the following instruction: "That the record of the county court showing a final settlement of the estate of William Stevenson, deceased, by Margaret Stevenson, in the name of Margaret McGee, is *prima facie* evidence that the said estate is indebted to her in the sum of \$4.81, and unless this is rebutted by the evidence of the plaintiff, they will find for the defendants." The court held that the instruction was erroneous; that the administratrix having made a final settlement, the power of the court over her accounts ceased with that act. There is certainly nothing in this case which gives an annual settlement the binding force and effect of a final settlement, or militates against the distinction between an annual and final settlement, as contended for by the appellant.

The next case is that of *Strong v. Wilkson*, 14 Mo. 116. We are unable to find anything in this case which bears upon the point we are considering. The case is very imperfectly reported, and if anything can be gathered from it, it is simply that a settlement made in the county court by an administrator, which is fraudulent in law, may be set aside by a court of chancery.

The next case is *Jones v. Brinker*, 20 Mo. 87. The suit was on the administration bond, and the petition alleged as breaches of the condition of the bond, that the administrator had obtained credit in his various settlements with the county court for illegal charges, specifying the settlements and the items of illegal charge, to which petition the defendants demurred, and the demurrer was sustained; and this court held that it was properly sustained, because the petition did not allege that the credit for illegal charges was obtained by fraudulent and false means and pretenses. In delivering the opinion of the court, Judge Ryland, while speaking of the effect of allowances made to administrators by the county court in their annual and final settlements, says: "Those allowances and settlements have the effect of judgments, and are considered as conclusive between the parties interested and concerned therein at law. But it is allowed to a party interested to file his bill in chancery against the administrator, charging him with having made false and fraudulent accounts, and having fraudulently procured allowances in his favor to be made to him by the county court." The point invoked in the case at bar was not discussed or raised in this case. No attempt was made, at a final settlement, to correct mistakes in former settlements, but it was a suit on the administration bond, and the only question was as to the sufficiency of the petition—whether there was a sufficient allegation of the breach of the condition of the bond. A final settlement had been made, and as the annual settlements necessarily became merged in the final settlement, there could be no remedy but by a bill in chancery to surcharge and falsify. No question was made, as in this case, involving the distinction between an annual and final settlement; and the remark of the learned judge with respect to annual settlements was entirely outside of the case, and no authority is given in support of it.

The *State ex rel. Tourville v. Roland* is the next case cited by respondent, and between this and *Jones v. Brinker*, 20 Mo. 87, there is scarcely a shade of difference. It was a suit on a guardian's bond against principal and security, in which plaintiff alleged as a breach of the condition of the bond the failure of the guardian to rent out all the tenements and real estate of the relator, and his failure to account to the probate court or to the relator himself for certain rents, alleged to be due for premises occupied by said guardian. The defendants set up in their answer the settlements made by the guardian with

the probate court, showing that he had fully accounted for all the rents and profits of the real estate, which settlements the plaintiff offered to impeach; but the court rejected the evidence, and instructed the jury that the settlements of the guardian were conclusive in this action. This court sustained that view of the law, and stated in the opinion delivered that the plaintiff should have filed his bill in chancery to set aside the settlements before proceeding at law upon the bond. There is no analogy between the case and the one at bar. The last case relied upon is *Mitchell v. Williams*, 27 Mo. 399. This was also a suit on a guardian's bond, and for breaches of the condition it was alleged that the guardian had fraudulently made false charges against the plaintiff, and fraudulently omitted to make proper charges against himself in his settlements with the county court. The defendant denied the allegation of fraud, and insisted that his settlements (among which was the final settlement) were conclusive on the plaintiff. The suit was commenced under the practice act of 1849, which required the court, when the case was tried without a jury, to make a finding of the facts. The court found that the settlements were not correct, that the defendant obtained allowances which he was not entitled to, and that he ought to be charged with items omitted in his settlements. Judgment being given for the plaintiff, the defendants appealed to this court. Judge Richardson, in delivering the opinion of the court, seemed to doubt whether it was a suit upon the bond or a proceeding in chancery to set aside the allowances and settlements; but stated that, even if it was to be regarded as of the nature of an equity proceeding to set aside the settlements, still the judgment would have to be reversed, because the court below had omitted to find that said allowances and settlements had been procured by fraud. The analogy between this case and the one at bar is also not perceived.

It will be observed that in all Missouri cases a final settlement had been made, and as the suits were actions at law upon official bonds, the court could not treat the settlements otherwise than as conclusive upon the parties interested and as having the force and effect of a judgment. The parties having neglected to appear at the final settlements were necessarily remediless except by bill in equity to surcharge and falsify. To this extent do the Missouri decisions go, and we think no further. But the case at bar stands altogether upon a different footing. Here a party interested in the estate as a

residuary legatee appears at the final settlement and suggests certain errors, mistakes, and omissions in the previous settlements, and offers to make proof thereof, but is told that no inquiry or examination into such settlements can be made; and when he appeals to the circuit court, a referee is appointed to examine into the final settlement, and instructed not to examine into any other.

This, we think, was manifestly erroneous. Under our statute there is an obvious distinction between an annual and a final settlement. Of an annual settlement no notice is required to be given to the parties interested, and hence it becomes an *ex parte* proceeding; but a final settlement cannot be made without the publication for four weeks of a notice to the parties interested that the administrator intends to make such a settlement at the next term of the court. Why notify a party to appear if, when he does appear, his hands are to be tied and his mouth closed, and he is to be told that he has no right to question the accounts of the administrator as exhibited in the previous settlements? He may be able to show errors in addition, mistakes in calculations, and omissions to charge the administrator with money or property which may have come into his hands; yet he is denied the right of so doing, and told he must submit to all this, unless he files a bill in chancery and shows that such mistakes and omissions resulted from the fraudulent conduct of the administrator.

The probate judge himself, upon a final settlement, may, in reviewing the annual settlements, discover mistakes of his own, apparent upon the face of the settlement, in which the estate has suffered a loss of thousands of dollars; yet, according to the ruling of the court below, he cannot correct them, and the loss must fall upon the heirs, who most frequently are women and minor children.

To this doctrine we cannot subscribe, and we feel confident that it cannot be maintained upon reason or authority. At the last or final settlement all parties interested are notified to appear, and generally do appear if they desire to know the manner in which the estate has been administered, and the occasion is one well adapted to the correction of mistakes, whether in favor of or against the administrator. By giving the probate court at such a time the power of correcting errors and supplying omissions, no injury can result to the executor,

while it may be the means of protecting minors in the enjoyment of their patrimonial estates.

The other judges concurring, the judgment of the circuit court will be reversed, and the case remanded for further trial.

EFFECT AS RES JUDICATA OF ANNUAL SETTLEMENTS OF EXECUTORS OR ADMINISTRATORS. — The probate system generally prevailing in this country makes provision for partial settlements of administration accounts prior to the final settlement. These partial settlements are made either annually or more or less frequently, as the discretion of the court may dictate, and are called partial or annual settlements. But while all settlements of administrators' and executors' accounts are in a certain sense judicial determinations, yet there is a broad distinction between annual and final settlements. The one is wholly *ex parte* and without notice; the other can be made only upon due publication of notice to creditors and all persons interested. The one is made annually, or oftener, at the pleasure of the court; the other only when the estate is fully administered. The one is for the information of the court and the convenience of the administrator in the management of the estate; the other for the protection of the administrator, and is a final adjudication of the respective rights and obligations of the administrator, creditors, and heirs. The one is only *prima facie* correct, and is subject to correction of any errors or mistakes thereafter discovered in it, without appeal or any direct proceeding to review it or set it aside. The other is conclusive and final, unless set aside by appeal or direct proceeding therefor, or impeached for fraud. The one is, so to speak, a judgment *de bene esse*, the other a final judgment: *Musick v. Beebe*, 17 Kan. 47. Being made *ex parte* without notice to the heirs, legatees, creditors, and other interested parties, partial or annual settlements do not have the force and effect of judgments, and are not conclusive upon any party interested, not even the executor or administrator himself: *Liddel v. McVickar*, 6 N. J. L. 44; S. C., 19 Am. Dec. 369; *Folger v. Heidel*, 60 Mo. 188; *West v. West*, 75 Id. 204; *Clark v. Cress*, 20 Iowa, 50; *State v. Wilson*, 51 Ind. 96; *University v. Hughes*, 90 N. C. 537; *Stevenson v. Stephenson*, 3 Hayw. 123; *Goodwin v. Goodwin*, 48 Ind. 584; *Sumrall v. Sumrall*, 24 Miss. 258; *Snodgrass v. Snodgrass*, 1 Baxt. 157. And even final settlements, if made without notice to the heirs, are not conclusive upon them, but will be treated as partial or annual settlements: *Winborn v. King*, 35 Miss. 157; *Crawford v. Redus*, 54 Id. 700; *Bronson v. Ward*, 3 Paige, 133; *Clark v. Perry*, 5 Cal. 58; *Estate of Runyon*, 53 Id. 196; 3 Williams on Executors, 6th Am. ed., 2168. But partial or annual settlements though regarded as mere exhibits of the condition of the estate, *Seymour v. Seymour*, 67 Mo. 307, *Sheets v. Kirtley*, 62 Id. 417, nevertheless, like inventories, have the verity of judicial records: *Snodgrass v. Snodgrass*, 1 Baxt. 157; and will be treated as *prima facie* correct when impeached as erroneous: *Brazzale v. Brazzale*, 9 Ala. 491; *Goodwin v. Goodwin*, 48 Ind. 584; *State v. Wilson*, 51 Id. 96; *Heath's Estate*, 58 Iowa, 36; *Seymour v. Seymour*, 67 Mo. 307; *West v. West*, 75 Id. 204; *Winborn v. King*, 35 Miss. 157; *Crawford v. Redus*, 54 Id. 700; *Cavendish v. Fleming*, 3 Munf. 198; and the burden of showing them to be incorrect or fraudulent is upon the contestants: *Heath's Estate*, *supra*. They are, however, *prima facie* correct only, and are open to collateral attack: *West v. West*, 75 Mo. 204; and all errors, omissions, or mistakes therein of the court, or of the executor or administrators, though not excepted to, *Watts v. Watts*, 38 Ohio St. 480, *Goodwin v. Goodwin*, 48 Ind. 584, may be corrected at the instance of the court or any interested party upon a proper

and sufficient showing, either at the coming in of any subsequent annual account, — *Liddel v. McVickar*, 6 N. J. L. 44; S. C., 19 Am. Dec. 369; *Sturtevant v. Tallman*, 27 Me. 85; *Stearns v. Stearns*, 1 Pick. 157; *Bantz v. Bantz*, 52 Md. 686; *Watts v. Watts*, 38 Ohio St. 480; *Goodwin v. Goodwin*, 48 Ind. 589, — or upon the final settlement of the administration accounts: *Liddel v. McVickar*, *supra*; *Brazeale v. Brazeale*, 9 Ala. 491; *Willis' Adm'r v. Willis' Heirs*, 9 Id. 330; *Mix's Appeal*, 35 Conn. 121; *Clement's Appeal*, 49 Id. 519; *Goodwin v. Goodwin*, 48 Ind. 584; *State v. Brutch*, 12 Id. 381; *Collins v. Tilton*, 58 Id. 374; *Coburn v. Loomis*, 49 Me. 406; *Sumrall v. Sumrall*, 24 Miss. 258; *Seymour v. Seymour*, 67 Mo. 307; *Ritchey v. Withers*, 72 Id. 559 (at the instance of creditors); and it is the duty of the court to hear evidence in this regard when exception is taken by the heirs or other interested parties: *Collins v. Tilton*, 58 Ind. 374. And the fact that an allowance has been made by a former judge of the court by a mere approval of a partial report is no reason why a subsequent judge of the court should refuse to hear evidence in regard to the item: *Id.*

Annual settlements are mere exhibits which are merged in final settlements, and when final settlements are set aside, this fully opens the annual settlements to examination and correction for fraud without the necessity of asking to have them formally set aside: *Sheetz v. Kirtley*, 62 Mo. 417; see *Longley v. Hall*, 11 Pick. 120. Only former accounts in the course of the settlement of the same estate, however, can be opened on the settlement of a subsequent account. The proceedings in other estates, though the same person be executor or administrator, and although the property of one be derived from the other, are collateral merely as judicial proceedings: *Granger v. Bassett*, 98 Mass. 462. But on the settlement of the final account of an executrix, as rendered by her husband after her decease, prior accounts rendered by her may be opened and corrected, upon objections made by the administrator *de bonis non* appointed after the death of the executrix: *Wiggin v. Swett*, 6 Met. 194; S. C., 39 Am. Dec. 716. The settlement of an administrator, when his letters are revoked, is not technically a final settlement, but is final only as to the administrator whose letters are revoked, and as to the estate is only an annual settlement: *Musick v. Beebe*, 17 Kan. 47.

EFFECT OF DETERMINATION OF MATTER IN DISPUTE BY PROBATE COURT AND OF DECISION ON APPEAL, AND OF RIGHT OF APPEAL. — In Massachusetts it is provided by statute that when an account of an executor, administrator, or trustee is settled in the absence of a person adversely interested, and without notice to him, such account may be opened on the application of such person, at any time within six months after the settlement thereof, and upon the settlement of an account all former accounts of the same accountant may be so far opened as to correct a mistake or error therein; except that a matter in dispute which has been previously heard and determined by the court shall not, without leave of the court, be again brought in question by any of the parties to such dispute: Mass. Pub. Stats., c. 144, sec. 9; and see also *Saxton v. Chamberlain*, 6 Pick. 422. A determination of matters in dispute by the probate court upon exceptions to a partial account is conclusive upon the parties to the dispute, unless the decision is appealed from, and such matters cannot be again called in question by the same parties on the hearing of a subsequent account, at least, without leave of the court: *Stayner's Case*, 33 Ohio St. 481; *Watts v. Watts*, 38 Id. 480; *Coburn v. Loomis*, 49 Me. 406; and a hearing and determination of such matters on appeal is final and conclusive in the probate court between the same parties on the hearing of all subsequent accounts. In such case, the probate court has no

power to open up or disregard the order or judgment of the court of common pleas in the settlement of the disputed items in the former account. Nor, on the hearing of another appeal on a subsequent account, will the appellate court re-open the former adjudication and re-examine the same matters: *Stayner's Case, supra*. But the mere right of appeal from a partial settlement will not give it a conclusive character, for a party may well take his chances of having an erroneous charge or credit corrected in the final settlement; and the fact that one of the several interested parties has appealed from a partial settlement, and that the settlement has been adjudged correct as to a particular item, will not conclude other interested parties who were not parties to the appeal, and have not therefore had their day in court, as to this or any other of the items contained in the partial settlement; and there is nothing therefore in the way of the probate court dealing with this item on the final settlement as if there had been no appeal and correcting the settlement in this respect. But a party who appeals from a partial settlement must make all objections then existing to the account as it stood, and if he fails to object to a particular item, he waives the objection, and he cannot afterwards urge it: *Oleum's Appeal*, 49 Conn. 535, 536. The statutes of Pennsylvania, however, recognize no distinction between original and final accounts of executors or administrators, and where appeal is not taken, or a bill of review filed, within the statutory period, a partial account is conclusive, and it cannot be re-examined on the coming in of a subsequent account: *Rhoad's Appeal*, 39 Pa. St. 186; *McLellan's Appeal*, 76 Id. 231; see *Bower's Appeal*, 2 Id. 432. But nothing is settled by a partial account, except those matters constituting the items in question in the statement itself, and it does not operate in any way on items of charge or discharge not included in it, and credits not claimed in prior accounts may be claimed in a subsequent one: *Leslie's Appeal*, 63 Id. 255; *Shindel's Appeal*, 57 Id. 43; *McLellan's Appeal*, 76 Id. 231; *Froese's Appeal* 105 Id. 258.

We have seen that the reason of the rule that partial settlements are not regarded as *res judicata* is that the account is settled *ex parte* without notice to parties interested. Therefore, if the statutes provide for notice upon annual or partial settlements in the same way as upon final settlements, the reason of the rule would cease, and all parties be equally concluded as to the matters embraced within the annual settlement as by a final settlement, provided, of course, the notice is properly given. Such are the provisions of the California statutes, which require the posting of notices, and such further notice as the court may deem proper, upon the rendering of any account for settlement: Code of Civil Procedure, sec. 1638; and also provide that the settlement for an account shall be conclusive against all parties interested except persons under disabilities: Id., sec. 1637; but even under these statutes the annual account of an administrator is not conclusive against himself or the heirs and creditors, except as to such items as are included in it, and actually passed upon by the probate court: *Wells v. Walker*, 37 Cal. 424. See also Code of Civil Procedure, sec. 1636; and where it appears that by reason of irregularities in the proceedings, parties in interest have not been heard in the settlement of the annual account of an administrator, the cause will be remanded for further proceedings: *Estate of Rumyon*, 53 Id. 196.

THE PRINCIPAL CASE IS CITED to the point that annual settlements of an administrator are *prima facie* evidence of their correctness, but are not conclusive upon interested parties, being subject to revision and correction on the final settlement: *Seymour v. Seymour*, 67 Mo. 307; *Folger v. Heidel*, 60 Id. 288; *Ritchey v. Withers*, 72 Id. 559. So the allowance of a guardian's ac-

counts, rendered from time to time, although a judicial act, is not in the nature of a final adjudication between the parties. The action of the probate court is had during the minority of the wards and *ex parte*, and the most that can be claimed from it is that the accounts as allowed are presumed to be correct until the contrary appears. But they are only *prima facie* correct; and wherever they are erroneous, the ward may have them corrected. They are only partial accounts, and do not bind him in any particular when he is able to show they are erroneous: *Willis v. Fox*, 25 Wis. 651; and an entry of satisfaction and a decree discharging a guardian, made without an examination of his account, and without the required notice having been given, is void, and may be set aside at any time: *Mead v. Babwell*, 8 Mo. 554.

JUMP v. BATTON'S CREDITORS.

[25 MISSOURI, 192.]

OMISSION OF SEAL OF COURT FROM WRIT MAKES IT IRREGULAR, BUT NOT VOID, and it may be amended by affixing the seal pending a motion to quash.

PERMISSION TO SUBSEQUENT ATTACHING CREDITORS TO APPEAR AND DEFEND PRIOR ATTACHMENT is within the sound discretion of the court under the Missouri statute; and the refusal of permission to such creditors to plead in abatement is not error where there is nothing to show that the court exercised its discretion unsoundly.

SUBSEQUENT ATTACHING CREDITOR, IN DEFENDING AGAINST PRIOR ATTACHMENT, MUST PLEAD within the time allowed to the attachment defendant.

WRIT of error by McClurg and others, attaching creditors of James and William H. Batton, against Jump. Jump commenced an attachment suit against James and William H. Batton, and the attachment was levied upon certain lands of the defendants, who were non-residents. During the pendency of this suit McClurg and others also commenced an attachment suit against the same parties, and the writ was levied upon the same lands. These subsequent attaching creditors then moved the court to quash the first writ of attachment, on the ground that it was not under the seal of the court, and that the affidavit upon which the writ was sued out was contradictory, inconsistent, and repugnant in its allegations. Afterwards Jump moved the court for leave to amend the writ, which the court granted, and ordered the clerk to attach the seal of the court to the writ. And on the same day the court overruled the motion of the subsequent attaching creditors to quash. Afterwards, and on the eighth day of the term, these creditors asked leave to file a plea in abatement, which was refused, and the court gave judgment by default in favor of Jump, and ordered the lands to be sold. By leave

of court the subsequent attaching creditors afterwards filed their motion to arrest the judgment, and this motion was overruled, whereupon the plaintiffs in error filed their bill of exceptions.

Lindenbower, Sherwood, and Orr, for the plaintiffs in error.

E. B. Ewing, for the defendant in error.

By Court, DRYDEN, J. 1. The writ of attachment in this case was irregular for want of the seal of the court, but was not for that cause a nullity, as contended by the plaintiffs in error.

It has been held by this court, *Davis v. Wood*, 7 Mo. 165, that the provision of the state constitution requiring all writs and process to run in the name of "the state of Missouri," is merely directory, and that an omission to comply with the requirement is only an irregularity; so in regard to sealing. The statute requires all writs and process to be under the seal of the court from which they issue, but it nowhere declares the absence of the seal shall render the process void. The only office of the seal is to authenticate or to prove the genuineness of the writ to which it is attached. It is held in Massachusetts that the want of the seal is merely formal, and affects the regularity of the process only: *Foot v. Knowles*, 4 Met. 391; *Brewer v. Sibley*, 13 Id. 175. And in New York it is settled that a writ without the seal of the court is not void, and therefore amendable: *People v. Dunning*, 1 Wend. 17; *Jackson ex dem. Culver v. Brown*, 4 Cow. 550. The writ was amendable, and the court therefore committed no error in permitting the respondent to amend by affixing the seal pending the motion to quash, and in refusing to quash.

2. We find no fault with the action of the court in refusing the plaintiffs in error permission to plead in abatement to the attachment. In the first place, the plaintiffs being strangers to the suit in which they proposed to plead, the privilege of appearing at all rested wholly in the discretion of the court. The law provides, Rev. Code, 1855, p. 256: "Sec. 59. In all suits by attachment wherein there is no personal service on the defendant, and the defendant shall not appear to the action, the court in which such suits are pending may, for the furtherance of justice, in its discretion, permit any person or persons who are attaching creditors of the same defendant to appear in said suits on behalf of the defendant, and make all such defense as the defendant could have done." There is

nothing in the case to show that the court exercised its discretion unsoundly. Not only was the motion for leave to plead unaccompanied by any affidavit in support of the truth of the plea, but in looking into the record it is seen that the ground on which the plaintiffs in error sued out their attachment is identical with one of the grounds in the respondent's affidavit. This was a fact the court could not help seeing; and until some explanation was given, supported by the oath of the party, although the affidavits in the two cases were made at different periods of time, the court might well refuse to allow the plaintiff to intervene.

Furthermore, the plea was out of time. A stranger coming in, in the place of the defendants, could have no higher right than the defendants themselves; supposing the term at which these proceedings transpired was the return term in the respondent's case, the defendants to the suit were bound to appear at farthest on or before the sixth day of the term: *Hamilton v. McClelland*, 33 Mo. 315. The record shows the motion to quash was filed on the third day of the term, and overruled on the fifth, and the offer to plead in abatement was on the eighth day of the term. Had the offer been made by the defendants themselves, it would have been too late.

There is no error in the record. Let the judgment be affirmed.

BATES, J., concurred.

BAY, J., did not sit in this case.

INTERVENTION BY SUBSEQUENT ATTACHING CREDITOR FOR PURPOSE OF CONTESTING VALIDITY OF FIRST ATTACHMENT: See *Speyer v. Ihmels*, 81 Am. Dec. 157.

SEAL TO WRIT OF ATTACHMENT, WHETHER CAN BE SUPPLIED BY AMENDMENT: See *Foss v. Isett*, 61 Am. Dec. 117, and note 118, and the note to *Barber v. Swan*, 61 Id. 127, 128, treating this subject. As to what irregularities and defects will avoid an attachment, see *Friedenberg v. Pierson*, 79 Id. 164-174.

THE PRINCIPAL CASE IS CITED to the point that the provision of the constitution declaring that the style of the laws of the state shall be "Be it enacted," etc., is directory and not mandatory, and an act regularly passed by the legislature may be valid when this clause is omitted: *City of Cape Girardeau v. Riley*, 52 Mo. 428; and to the point that an indictment is not fatally defective because headed "State of Mo." instead of "State of Missouri," as provided by the constitution, this provision being also directory merely: *State v. Foster*, 61 Id. 550.

HILL v. STURGEON.

[28 MISSOURI, 212.]

DEFECT IN VESSEL OR WANT OF SKILL IN CARRIER OR HIS SERVANTS will not per se entitle the plaintiff to recover in an action against a common carrier for loss, but it must also appear that such defect or want of skill contributed or may have contributed in some manner to the loss.

IT IS SUFFICIENT FOR CARRIER TO SHOW IN DEFENSE OF ACTION against him for loss that the loss was caused by the perils of navigation within the exceptions of the bill of lading, and he is not bound to show affirmatively the particular and identical cause of the loss.

ACTION against the owners of the steamboat Ironton and the barge John Argent to recover the value of merchandise shipped on board the steamboat and barge. The bill of lading excepted the dangers of the river and of fire. The loss of the goods was caused by the Ironton sheering to the larboard while running up stream with two barges in tow. On this side was the barge Argent, and the steamboat drifted so abruptly and violently against the bank that the side of the barge was forced in, which caused it to sink, and by that means plaintiffs' property was lost. The plaintiffs contended that the goods were lost by the negligence of the defendant in having an unskillful and incompetent pilot at the wheel at the time of the accident; and the defendants insisted that the loss was caused by an unavoidable peril of the river.

S. Knox and J. H. Rankin, for the appellants.

B. A. Hill, for the respondents.

By Court, BAY, J. This case was in this court at the March term, 1859, and is reported in 28 Mo. 323. The court then laid down certain principles of law applicable to the case, and among others it was held that a common carrier is an insurer of goods intrusted to him for carriage, and is liable in all events for any loss or damage, unless it happen by some cause or accident for which the law excuses him, or from some cause expressly excepted in the bill of lading, and that the burden is on him to show that he fully performed his contract, or that the goods were lost by one of the excepted perils; that the usual words in bills of lading "dangers of the river" mean only the natural accidents incident to river navigation, and do not embrace such as may be avoided by the exercise of that skill, judgment, or foresight which are demanded from persons in a particular occupation; that it was incumbent upon the de-

fendants to show that the loss was caused by a peril of the river which could not have been foreseen nor prevented by the exercise of skill or diligence, and that the last clause in the bill of lading was not designed to insure the goods shipped on the barge from loss that might happen to it by external violence. No objection was found by the court to the instructions given to the jury, as they embodied the principles of law above enunciated; but the judgment was reversed and cause remanded, because the court below refused to permit a witness to answer the question whether it was proper to suffer Decker to pilot the boat at the time and at the place of the accident. This court was of the opinion that the witness, who was an experienced pilot, was competent as an expert to answer the question, as he knew Decker and the place of the accident.

The evidence given upon the last trial does not differ materially from that given upon the former, nor is there any substantial difference in the instructions of the court; but our attention has been especially directed to two propositions of the plaintiffs, which, though made upon the former trial, were not urged with the same zeal as upon this. The first is, that if the defendants were in default they are liable, though the accident did not occur from such default; in other words, if Decker was not a competent pilot, the boat was not properly manned, and the defendants are liable though the loss was in nowise attributable to Decker's incompetency.

This proposition, we think, cannot be maintained upon reason or authority. The case of *Hart v. Allen*, 2 Watts, 114, is a leading case, and in most respects similar to the one at bar. In the opinion of the court, the subject is discussed with marked ability by Gibson, C. J.; and the conclusion reached was, "that in an action against a common carrier for a loss, it is not sufficient to entitle the plaintiff to recover that there was a defect about the vessel, or want of skill in the carrier; but it must also appear that such defect or want of skill contributed or may have contributed in some manner to occasion the loss."

The facts of the case are as follows: Plaintiffs shipped on board of steamer Bolivar, at Cincinnati, nine chests of tea, to be delivered in good order at Pittsburgh, unavoidable accidents and the dangers of the river excepted. On account of the low stage of water, it was impossible for the Bolivar to make the voyage without great damage to the vessel and cargo, and

when she reached Wheeling, the tea was put on a small keel-boat which, on the passage up the river, was driven by a sudden squall of wind sidewise and upset, whereby the teas were wet and damaged. The plaintiffs gave evidence that the pilot of the keel-boat was not an experienced boat-man or pilot, and upon this state of facts the inferior court charged the jury, "that although the accident resulted from the act of God, and could not have been prevented by any human prudence or foresight, and although it would in this respect come within the exception that excuses the carrier in case of loss, still, if the crew of the boat was not sufficient, or if she was not under the control of a master or pilot sufficiently skilled to perform the duties corresponding to his station, the carrier cannot avail himself of the exception, nor excuse himself from responsibility to the owner to the extent of the injury done to the goods."

For the error in this instruction the judgment was reversed, the court very properly remarking that it is the consequences of negligence, not the abstract existence of it, for which a carrier is answerable.

This view of the law was entertained by this court in *Collier v. Valentine*, 11 Mo. 299 [49 Am. Dec. 81]. The main question in the case was, whether, if a steamboat not seaworthy, on which there is a contract of affreightment, departs on a voyage and is afterwards sunk, in an action against the owners for not providing proper means for safely carrying the cargo, the defendant can show as a defense that the loss was occasioned by a peril excepted in the contract, and was in no manner influenced by the defect of unseaworthiness, and that it would have happened even had the boat been seaworthy. The court held that the evidence was competent as furnishing a good ground of defense. Judge Scott, who delivered the opinion, remarked that "a carrier ought to be liable for a loss occasioned by his default; but to hold him responsible for a loss by an excepted peril, not at all attributable to the default, would seem to be great injustice." While public policy requires that a common carrier should be held to a strict performance of his contract, and of every duty and obligation resting upon him, still it is not perceived what good can result from holding him liable for an act to which he has neither directly nor indirectly contributed.

The second proposition contended for by the appellants is, that though the sheering of the *Iron-ton* was caused by an unavoidable peril of the river, still it is not sufficient for the

defendants to prove that fact generally, but they must show affirmatively the particular and identical cause of the sheering.

The proof in the case is, that it is a very common thing in the Mississippi River for boats to sheer, even in the hands of the best pilots; that various causes produce sheering, among which are boils in the river, eddies, cross-currents, shoal water, snags, rocks, narrow channels, inequalities of the bottom, adverse winds, running too near a bar, defective model, improper loading of a boat, etc.; that many of these causes are readily guarded against, while others are invisible even to the practised and experienced eye. A jury might well be satisfied from the proof in a case that the sheering of a particular boat was caused by either boils, eddies, or whirlpools, and yet be wholly unable to conjecture which, or whether it was the result of the three combined. An experienced and skillful pilot might be fully satisfied that one of the three causes produced it, without being able to specify the particular one; and to require the defendants to do it in all cases would be in many instances requiring them to make proof of that which is not susceptible of proof.

We think therefore it is sufficient, if the defendants can show that the accident was the result of an unavoidable peril of the river, and was not contributed to by any negligence, want of skill, or default on their part. The question was one of fact, which the court below properly submitted to the jury; and the jury having passed upon it, we are not disposed to interfere with the verdict.

The other judges concurring, the judgment will be affirmed.

BURDEN OF PROOF IS UPON COMMON CARRIER to show that the loss is within the exceptions of the bill of lading: *Steele v. Townsend*, 79 Am. Dec. 49; *Western Transportation Co. v. Newhall*, 76 Id. 760, and note 776; *Baker v. Brinson*, 67 Id. 548, note 551.

CARRIER, EVEN UNDER EXCEPTION OF DANGERS OF RIVER, IS LIABLE FOR LOSS BY INCOMPETENCE or want of reasonable care, skill, and diligence of those whom he employs to navigate his vessel, as well as by insufficiency of the vessel or its equipments: *Bentley v. Bustard*, 63 Am. Dec. 561.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
NEW HAMPSHIRE.

PICKARD v. PERLEY.

[45 NEW HAMPSHIRE, 182.]

NOTICE TO QUIT BY ONE ASSUMING TO ACT AS AGENT OF ANOTHER, BUT HAVING NO AUTHORITY, CANNOT BE RATIFIED after the time when the notice is to operate, so as to lay the foundation for summary proceedings under the landlord-and-tenant act.

NOTICE TO QUIT BY TWO OF THREE JOINT LESSORS WILL NOT TERMINATE TENANCY AS TO ALL, so as to enable the three lessors to maintain summary proceedings under the landlord-and-tenant act.

ACTION under the landlord-and-tenant act to obtain possession of certain premises. The premises were leased to the defendant, David G. Perley, by the plaintiffs, Samuel C. Pickard, Seth B. Hoit, and George B. Elliot. A notice to quit, in usual form, signed "Samuel C. Pickard, Seth B. Hoit, George B. Elliot, by their attorney, N. Butler," was served on the defendant by Samuel C. Pickard. The defendant made no objection to the notice at the time it was delivered to him, nor at any time before this action was brought. On the trial he offered evidence to show that one of the plaintiffs had not authorized or assented to the notice at the time it was served, or at any time thirty days before the expiration of the notice, or authorized or assented to the commencement of this action. The court rejected the evidence, and the defendant excepted.

N. Butler, for the plaintiffs.

Minot and Mugridge, for the defendant.

By Court, **BELLOWS, J.** A notice to quit, given by one assuming to act as the agent of another, but in fact having no

authority, is not rendered valid as the foundation for summary proceedings under the landlord-and-tenant act, by a subsequent ratification, unless such ratification be as early as the time such notice is to operate. Until the notice is made effectual, the tenant may properly disregard it; and indeed, were he to quit the demanded premises in pursuance of such unauthorized notice, he might still be holden to pay rent, inasmuch as he also is required to give notice of his termination of the tenancy: *Currier v. Perley*, 24 N. H. 227.

To hold, then, that a ratification by the lessor of the act of such unauthorized agent, made subsequent to the time when the notice was to operate, should relate back to its date, would be manifestly unjust, and is not, we think, upheld by the authorities. Judge Story, in his work on agency, section 245, lays it down that where an act is beneficial to the principal, and does not create an immediate right to have some other act or duty performed by a third person, but amounts simply to the assertion of a right on the part of the principal, then the general rule, referring to the effect of ratification, seems generally applicable. But if the act done by such third person would, if authorized, create a right to have some act or duty performed by a third person, so as to subject him to damages or losses, or would defeat a right, or an estate already vested in the latter, then the subsequent ratification or adoption of the unauthorized act by the principal will not give validity to it so as to bind such third person to the consequences: See also *Id.*, sec. 246.

This doctrine was applied to notices to quit in *Doe ex dem. Mann v. Walters*, 10 Barn. & C. 626; and in *Doe ex dem. Lyster v. Goldwin*, 2 Ad. & E., N. S., 143; *Right v. Cuthell*, 5 East, 498, 500. The case of *Goodtitle v. Woodward*, 3 Barn. & Ald. 689, holds that there may be such subsequent ratification of a notice to quit; but this case is questioned by some of the judges in *Doe ex dem. Mann v. Walters*, *supra*; and besides, it is said in note 2 to section 246, Story on Agency, that the case of *Goodtitle v. Woodward*, *supra*, may be supported upon another ground. So it is held, in *Fiske v. Holmes*, 41 Me. 441, that a subsequent ratification will not operate to prejudice intervening rights, or to prejudice a person who has been guided by the transaction as it actually occurred.

The same principle has been applied in this state to a subsequent assent to the delivery of a deed: *Derry Bank v. Webster*, 44 N. H. 269. *Right v. Cuthell*, 5 East, 498, was a case

of a lease for twenty-one years, with a proviso that either party, their respective heirs and executors, might terminate it at the end of seven or fourteen years, by six months' previous notice in writing, under his or their respective hands; and on the death of the lessor, two of the three executors, in behalf of themselves and the other, gave the notice, and it was held not to be sufficient; and also, that a subsequent ratification by the other executor joining in the ejectment did not avail, "because the tenant was entitled to such notice as he could act upon with certainty at the time it was given, and was not bound to submit himself to the hazard, whether the third co-executor chose to ratify the act of his companions or not, before the six months elapsed."

There are several cases in this state touching a subsequent ratification of the act of one assuming to be an agent; among these are *Payne v. Smith*, 12 N. H. 34; *Gale v. Tappan*, 12 Id. 145 [37 Am. Dec. 194]; *Town of Grafton v. Follansbee*, 16 Id. 450 [41 Am. Dec. 736]; *Ham v. Boody*, 20 Id. 411 [51 Am. Dec. 235]; *Odiorne v. Mason*, 9 Id. 24; *Corser v. Paul*, 41 Id. 24 [77 Am. Dec. 753]; but none of these, we think, conflict with the views we have expressed.

On the contrary, in the case of *Town of Grafton v. Follansbee*, 16 N. H. 450 [41 Am. Dec. 736], where there was a suit against a collector of the town for moneys collected by him, and the plaintiff relied upon a demand by the town treasurer, ratified afterwards by bringing the suit, the court held that although the treasurer had no authority to make a demand, yet as payment to him would have discharged the collector, the subsequent ratification was good: See *Stevens v. Reed*, 37 Id. 49, where the doctrine of *Payne v. Smith*, 12 Id. 38, was applied to demand of dower by attorney.

Our conclusion, then, is, that the bringing of the suit, or other act, after the time when the notice to quit was to operate, could not be regarded as a ratification, so as to lay the foundation for this proceeding.

Another question, however, arises, and that is, whether a notice by two of the three lessors is sufficient to terminate the tenancy as to all. If the lessors are to be regarded as tenants in common, it must be understood, as in the case of joint tenants, that each demised his own share, and might put an end to that demise so far as it affected his own share, without the concurrence of his co-lessors: Co. Lit. 186 a; *Doe ex dem. Whayman v. Chaplin*, 3 Taunt. 120; *Doe ex dem. Aslin v. Summersett*, 1 Barn. & Adol. 135.

The notice, then, by two of the three lessors would put an end to the tenancy, in respect to their shares; and the question would be, whether it would also terminate the entire tenancy, so as to enable all the lessors to join in this proceeding. In *Doe ex dem. Aslin v. Summersett*, 1 Barn. & Adol. 135, before cited, which was a demise by two joint tenants, it was held that a notice to quit by one, in behalf of both, was sufficient to terminate the tenancy as to all, and it was put upon the ground that although upon a joint lease by joint tenants, each demises his own share, yet the operation of it is, that the tenant holds the whole of all the lessors so long as he and all shall please, and not that he holds the share of each so long as he and each shall please; and that as soon as any of the lessors gives a notice to quit, he effectually puts an end to that tenancy, and the tenant has a right to give up the whole; and unless he comes to a new arrangement with the other lessors, he is compellable to do so. Lord Tenterden, in giving the opinion of the court, says: "The hardship upon the tenant, if he were not entitled to treat a notice from one as putting an end to the tenancy as to the whole, is obvious; for however willing a man might be to be sole tenant to an estate, it is not likely he should be willing to hold undivided shares of it; and if upon such a notice the tenant is entitled to treat it as putting an end to the tenancy as to the whole, the other joint tenants must have the same right. It cannot be optional on one side only."

The reasoning of Lord Tenterden applies with equal force to the case of a joint lease by tenants in common; for there is the same unity of possession as in the case of joint tenants, and it would be equally a hardship upon the tenant if he could not treat a notice by one tenant in common as putting an end to the entire tenancy.

The case of *Doe ex dem. Aslin v. Summersett*, 1 Barn. & Adol. 135, then, must be considered an authority directly to the point that the notice was sufficient in the case before us, unless under our statute a different rule is to prevail. On the other hand, in the case of *Doe ex dem. Whayman v. Chaplin*, 3 Taunt. 120, which was ejectment on the demise of three out of four joint tenants, and also on the demise of the four, it being stated both ways, and the defendants having entered into the ordinary consent rule, confessing lease, entry, and ouster, a verdict was rendered for the defendant upon the supposed deficiency of the notice to quit, it having been signed by three

only of the four lessors. Afterwards, the question being reserved, the verdict was set aside upon the ground that the plaintiff was entitled to recover three fourths of the demised premises. In the examination of the question, the hardship to the tenant, in not being allowed to treat the notice of a part of the lessors as a termination of the entire tenancy, was considered, and although it was not expressly decided that the plaintiff could not recover the whole, as is suggested in *Doe ex dem. Aslin v. Summersett*, 1 Barn. & Adol. 135, yet it is to be plainly inferred from the decision that he could not.

The case of *Right v. Cuthell*, 5 East, 491, before cited, is to the point that when, in a lease for twenty-one years, there was a proviso that either party, his heirs or executors, might terminate it at the end of seven or fourteen years, by a notice in writing under his or their respective hands, a notice signed by two of the three executors of the lessor was insufficient: See also Taylor's Landlord and Tenant, sec. 479.

So it is laid down that if joint tenants join in a feoffment, every one of them in judgment of law doth give but his part, and therefore if two joint tenants made a feoffment in fee upon condition, and for breach thereof, one of them shall enter into the whole, yet he shall enter but into a moiety, because no more in judgment of law passed from him: Co. Lit. 186 a.

By the Compiled Statutes, c. 222, secs. 1 and 6, any lessor or lessee may determine any lease at will or tenancy at sufferance by giving a notice in writing to take effect at a day named; and bearing in mind that, although several joint tenants or tenants in common join in a lease, yet each demises only his own share, we think that the weight of authority is against the decision of *Doe ex dem. Aslin v. Summersett*, 1 Barn. & Adol. 135, and that a notice to quit by one of the tenants in common will put an end to the lease only as respects the share demised by him.

It is true that this rule might operate as a hardship upon the tenant where he would be unwilling to hold a share only of the demised premises, and could not give notice of a termination at the same time of the entire lease to the other lessors. On the other hand, cases might often arise where it would be for the interest of the tenant to continue to hold the remaining share, and where he would elect to do so if in his power. To hold, then, that a notice to quit by one of several lessors must terminate the entire lease, might be a great hard-

ship to the tenant, as it might compel him to give up what it would be for his interest to hold, and what he had not been called to surrender by the owner.

If the lease by joint tenants or tenants in common be in the usual form, it will be regarded as a demise by each of his own share only, and for aught we can see, must, upon authority, stand much upon the same footing as separate leases, so far, at least, as respects the question before us. If, on the other hand, the lease was to be regarded as a joint demise by all, then a notice by all would seem to be necessary to determine it, for it can hardly be concluded that a joint demise could be determined by a single lessor unless so stipulated.

Whether, in any case of a joint lease, and a notice to quit by one of the lessors, the tenant might not at his election give up the whole at the time appointed, upon the ground that he ought not to be required to hold a part only, we need not now inquire, as we are of the opinion that the notice to quit by one only of several lessors will ordinarily terminate the lease only as respects his share.

In the case of *Doe ex dem. Whayman v. Chaplin*, 3 Taunt. 120, the lessors were trustees, and the notice to quit was signed by three out of the four, and also by the *cestui que trust*, as it would seem; and in *Right v. Cuthell*, 5 East, 491, the original lessor was represented by three executors, two of whom only signed the notice; and no distinction was attempted to be made in either case upon the ground that the lessors were merely trustees. Whether in any case a distinction could be made, it is not necessary now to decide.

The fact that the defendant did not object to the notice when it was delivered might be *prima facie* evidence of the authority of Butler, but it was liable to be rebutted by showing the want of such authority.

It is contended by the plaintiff's counsel that it is immaterial whether one of the plaintiffs was shown not to have assented to the notice, provided he assented to the employment of Mr. Butler to obtain possession of the desired premises; and this may be true, and still, as part of the defense, it would be competent to show want of assent to the notice. With these views, therefore, we think the evidence of want of assent was admissible.

RATIFICATION OF UNAUTHORIZED ACTS IN GENERAL: See *Persons v. McKilben*, 61 Am. Dec. 85; *Newton v. Bronson*, 67 Id. 89; *Davis v. Burnett*, 67 Id. 263; *Billings v. Morrono*, 68 Id. 235; *Starks v. Sikes*, 69 Id. 270; *Philadel-*

phia etc. R. R. v. Cowell, 70 Id. 128; *Bell v. Byerson*, 77 Id. 142; *Corsier v. Paul*, 77 Id. 753; *Ward v. Williams*, 79 Id. 385, and the notes thereto. As to the distinction between ratifying unauthorized contracts and unauthorized acts creating a duty in a third person towards the principal, see Wharton on Agency, secs. 78-80; and compare *Town of Grafton v. Follansbee*, 41 Am. Dec. 736.

HEALEY v. TOPPAN.

[45 NEW HAMPSHIRE, 242.]

GENERAL BEQUEST OF PERSONAL PROPERTY TO ONE PERSON FOR LIFE, WITH REMAINDER OVER, REQUIRES so much of the property as is of a perishable nature to be converted into permanent securities for the benefit of the remainderman, giving the tenant for life the income arising therefrom; unless some expression of intention that the property is to be enjoyed *in specie* can be gathered from the will.

SPECIFIC BEQUEST OF PERSONAL PROPERTY TO ONE PERSON FOR LIFE, WITH REMAINDER OVER, IS ABSOLUTE GIFT to the tenant for life where the property is of such a nature that it perishes in the using; but if the tenant should die before it is consumed, whatever remains will go to the remainderman, and not to the representatives of the tenant.

SPECIFIC BEQUEST OF PERSONAL PROPERTY TO ONE PERSON FOR LIFE, WITH REMAINDER OVER, ENTITLES TENANT TO ITS POSSESSION AND USE during his lifetime, and the remainderman to the property thereafter, where the property is of such a nature that it is not consumed, but only deteriorates or wears out by use; and the tenant is not required to give security to the remainderman, but only to file an inventory for his benefit; although the remainderman may have security when it is shown that there is real danger that the property will be wantonly wasted or fraudulently secreted or removed.

RESIDUARY BEQUEST, IF GIVEN "SUBJECT TO" PAYMENT OF ANNUITY TO ANOTHER FOR LIFE, IS CHARGED with the annuity; and before the property is delivered to the legatee, the executors should set apart an amount, sufficient to meet the annuity, from the income.

BEQUEST OF REAL ESTATE FOR LIFE, WITH REMAINDER OVER, IS ALWAYS TO BE TREATED AS SPECIFIC DEVISE, of which the tenant for life is to have the possession, use, and income during life.

BEQUEST OF PERSONAL PROPERTY WILL NOT BE HELD SPECIFIC merely because it is combined with a devise of land.

SHIPPING, INCLUDED IN GENERAL RESIDUARY BEQUEST TO ONE FOR LIFE, WITH REMAINDER OVER, SHOULD BE CONVERTED into money, and together with the profits of the shipping arising during the settlement of the estate, after paying the tenant for life a proper amount of interest on the sum, should be invested by the executors in permanent securities, for the benefit of the remainderman, giving the tenant for life the income arising therefrom.

GENERAL BEQUEST OF PERSONAL PROPERTY TO ONE PERSON FOR LIFE, WITH REMAINDER OVER, ENTITLES TENANT FOR LIFE TO SUCH INCOME on the clear principal, during the process of administration, from the death of the testator, where no time for the commencement of the enjoyment of

the income is prescribed, as will make it worth the same to him annually that it will be worth to the remainderman. In this case, five per cent allowed.

APPEAL from the court of probate. The controversy arose on the settlement of the accounts of Charles N. Healey and Mrs. Ann E. S. Toppan, executors of the last will and testament of Christopher S. Toppan. The facts are sufficiently stated in the opinion.

W. H. Y. Hackett, for the plaintiff.

Hatch, for the defendant.

By Court, **SARGENT, J.** The testator first gives and bequeaths to his wife "all my property in possession, and all and every contingent interest arising or growing out of any property now in my possession or in expectancy," subject to the following conditions: 1. That his wife should pay the sum of six hundred dollars per year to the testator's two sisters during their lives and the life of the survivor; and 2. That after the death of his wife, one half of all his property should be held in "trusteeship" (the trustees to be named in the will), to be disposed of in the following manner: His farm in Hampton is to be for the use of Christopher Grafton Toppan during his life, then to his son, etc., and in default of such son, to Hampton Academy, if then in existence and in active operation; but if not, then to the Congregational Society in Hampton. "The remainder of my property being personal, with some real estate situated in the city of Portsmouth, the income arising therefrom shall be equally divided and paid to all my nephews and nieces, yearly, so long as they or any of them may live; and the last survivor of them shall be the receiver of all the property held by my trustees for their account."

There might at first be doubt whether the testator, after disposing of his farm, in speaking of the remainder of his property, did not mean all the rest of his property. But taken in connection with what precedes and follows, it must be held to refer to the remainder of the half which he had provided should go into the hands of trustees for the benefit of his nephews and nieces.

In the third article in the will the testator gives to his wife "all the furniture, fixtures, silverware, jewelry, watches, clothing, appurtenances, carriages, and horse, if any I own, in the city of Portsmouth, cows and oxen, live-stock, and farming utensils, either at Hampton or Portsmouth, and any property

on my place in Hampton, either in the house, barns, corn-house, wood-house, or sheds, or in any of the outhouses, considered as personal property," for her sole use and benefit; and he provided that said property should not be taken into account as any part of the estate for which his wife was to be in any way responsible; nor was it to be reckoned in ascertaining the amount of his property, unless it became necessary to do so that it should amount to such a sum that the annual income of it all might be eleven hundred dollars (five hundred dollars for his wife and six hundred dollars for his sisters). In that event only it was to be included in ascertaining the whole amount of his property. When thus included, if all his property should be so small that, after paying debts, the income of it all would not be over five hundred dollars, with her house-rent, then she was not to pay anything to the testator's sisters. But if the income of all his property should exceed five hundred dollars besides the house-rent, and not be sufficient to pay the whole six hundred dollars to his sisters, then they were to be paid a proportional part of said sum.

But the estate proves to be of sufficient amount after paying all debts, so that this property thus specifically given to the widow does not need to be included in making up the amount of the estate, for which, or for the income of which, the widow is to be in any way or at any time responsible. For the same reason, the two thousand dollars bequeathed to the Hampton Academy, in the fourth article in the will, and the one thousand dollars to the Portsmouth Athenaeum, in the sixth article, both of which are given on condition that the estate should exceed a certain amount, became absolute bequests, and have been properly paid by the executors. The five hundred dollars given to Sarah P. T. Healey, in the seventh article in the will, was an unconditional bequest, and has also been properly paid by the executors. The inventory shows that there was live-stock and produce, such as corn, potatoes, hay, oats, etc., to the amount of \$578; farming utensils to the value of \$75; household furniture at Portsmouth \$3,000, and at Hampton \$300, making in all \$3,953—all of which is specifically given to the widow. All that the executors, as such, have to do with this property, is to have it inventoried, and deliver it over to Mrs. Toppan, taking her receipt therefor, and this will be the end of their responsibility for this property.

Now, since the amount of the testator's property, without including the articles specifically bequeathed to his wife, is

known largely to exceed the sum of fifty thousand dollars, after paying all debts, let us see what is the construction to be given to the will, and what are its substantial provisions, stated in the order in which such provisions are usually placed in instruments of this kind. Omitting the conditions dependent upon the amount of his property, and the will provides:—

1. For the payment of debts; 2. The payment of a legacy of five hundred dollars to Sarah P. T. Healey; 3. It gives certain specific articles of personal property to Mrs. Toppan for her sole use and benefit; 4. It gives a legacy to Hampton Academy of two thousand dollars; 5. It gives a legacy of one thousand dollars to the Portsmouth Atheneum; 6. It gives to his wife all the rest, residue, and remainder of all the testator's property in possession, and all and every contingent interest arising or growing out of any property then in his possession or in expectancy, subject to two conditions, which have already been stated.

In any view that can be taken of the will, the result is the same in regard to the bequest to the wife; she is residuary legatee of all his property that shall remain after the payment of debts and the legacy of five hundred dollars, and the gift to the wife of specific articles, in one event; and in another, it is what should remain after deducting these, and also the legacy to Hampton Academy and to the Portsmouth Atheneum. And it is not a bequest of any particular property specifically, but of all his property in possession or in expectancy, or the residue of it all.

Now, it is a rule of long standing and well established in the English court of chancery, that where a testator makes a general gift of his estate, or the residue of his estate generally, to or in trust for any person for life, with remainder over, so much of the property as is of a perishable nature must be converted and invested in permanent securities for the benefit of the remainderman, and the tenant for life shall have only the income arising therefrom. The same rule applies to articles *quæ ipso usu consumuntur*, such as corn and other provisions, wines, fruits, live-stock, and the like, when such articles, instead of being specifically bequeathed, are included with other property in such a general gift of all, or the residue of all, the testator's estate generally, to one for life, with remainder over.

But the rule is different where the bequest is of specific articles to one for life, with remainder over. There the tenant

for life is entitled to the possession and use of the property; and should the article be worn out or damaged, or wholly destroyed during the life estate, the remainderman has no remedy. When therefore there is such a specific bequest of articles which perish in the using, such as corn, wine, etc., then the whole title and property is ordinarily held to rest in the tenant for life, as there could ordinarily be nothing remaining of the specific property for the person in remainder. Therefore, such a specific bequest of such articles as *ipso usu consumuntur* to one for life, with remainder over, is treated as an absolute gift to the tenant for life. And still it might happen otherwise; because, if the tenant for life should suddenly die before the provisions were consumed or the other property had perished in the using, such as remained would go to the remainderman, and not to the heirs of the tenant for life.

This distinction between bequests of specific articles of property and general bequests of all or of the residue of all the testator's property generally was not noticed in the earlier decisions. In fact, in the earlier English cases, the bequests were generally of specific articles, such as silver plate, sets of pearls, household furniture, or the like, where the question raised was whether the tenant for life should be compelled to give security to the remainderman for the property at the close of his term; and after some conflict it was settled that no such security should be required; that an inventory of the property was all that could be demanded; that the tenant for life was entitled to the possession and use during his life, and if the property depreciated in value there was no remedy to the remainderman; and that when such articles were specifically given as perished in the using, then, of necessity, the tenant for life had an absolute property, and was not accountable to the remainderman: *Hyde v. Parrat*, 1 P. Wms. 1; *Upwell v. Halsey*, 1 Id. 651; *Hastings v. Douglas*, Cro. Car. 343; *Wilkinson v. South*, 7 Term Rep. 553; *Smith v. Clever*, 2 Vern. 59; *Clarges v. Albemarle*, 2 Id. 245; *Slanning v. Style*, 3 P. Wms. 334; *Foley v. Burnell*, 1 Brown Ch. 279; *Randall v. Russell*, 3 Mer. 194; *Leeke v. Bennett*, 1 Atk. 471.

But in *Howe v. Earl of Dartmouth*, 7 Ves. 137, it was settled as the rule, that where a bequest of personal property was not specific, but was a general gift of all such property, or of the residue of such property generally, to a person for life, with remainder over, and where such general bequest includes per-

ishable property, the object of the testator can only be affected by converting such property into permanent securities, and giving each person in succession the dividends of the fund. This rule has been recognized and adopted in *Fearn v. Young*, 9 Id. 549; *Dimes v. Scott*, 4 Russ. 195; *Bethune v. Kennedy*, 1 Mylne & C. 114; *Alcock v. Soper*, 2 Mylne & K. 699; *Collins v. Collins*, 2 Id. 703; *Mills v. Mills*, 7 Sim. 501; *Pickering v. Pickering*, 2 Beav. 31; S. C., 4 Mylne & C. 298; *Lichfield v. Baker*, 2 Beav. 481; *Benn v. Dixon*, 10 Sim. 636; *Goodenough v. Tremamondo*, 2 Beav. 512; *Hunt v. Scott*, 1 De Gex & S. 219; *Neville v. Fortescue*, 16 Sim. 333; *Pickup v. Atkinson*, 4 Hare, 624; *Cafe v. Bent*, 5 Id. 36; *Vaughan v. Buck*, 1 Phillips, 75; *Daniel v. Warren*, 2 Younge & C. Ch. 290; *Burton v. Mount*, 2 De Gex & S. 383; *Johnson v. Johnson*, 2 Colles, 441; *Bowden v. Bowden*, 17 Sim. 65; *Lichfield v. Baker*, 13 Beav. 447; *Morgan v. Morgan*, 14 Id. 72; S. C., 7 Eng. L. & Eq. 216; Hill on Trustees, 386; 2 Lead. Cas. Eq., 3d Am. ed., 514; *Hood v. Chapham*, 19 Beav. 90; *Jebb v. Tugwell*, 20 Id. 84; *Blann v. Bell*, 5 De Gex & S. 658.

In *Morgan v. Morgan*, 14 Beav. 72, it is said that the rule, as laid down in *Howe v. Earl of Dartmouth*, 7 Ves. 137, is correct and will prevail, unless there can be gathered from the will some expression of intention that the property is to be enjoyed *in specie*, and which it is incumbent on those contesting the application of the earl to point out; and that modern cases allow small indications of intention to prevent the application of the rule, but the mere absence of any direction to convert the property is insufficient.

In *Cafe v. Bent*, 5 Hare, 36, it is said that the general rule as to the conversion of wasting property does not proceed on the assumption that the testator intended his property to be sold, but upon this, that the testator has intended the enjoyment of perishable property by different persons in succession, and this the court can accomplish only by a sale: See also remarks of Lord Brougham in the House of Lords, to the same effect, in *Pendergast v. Pendergast*, 3 H. L. Cas. 195.

The distinction between a specific and a general or residuary bequest or gift of chattels is not only thus established in England but is fully recognized in the United States. Where there is a specific gift of articles *quæ usu consumuntur*, as hay, corn, wine, provisions, etc., for life, with remainder over, the remainder is ordinarily void, at least where the tenant for life lives to consume it all, and the first legatee takes absolutely.

But where such specific gift is of articles which are not consumed by use, but are only deteriorated or wear out, such as furniture, plate, and farming utensils, the remainder is good; but the tenant for life is entitled to the possession and use of the articles, and is not required to give security, but only to file a schedule of them for the benefit of the remainderman: 1 Story's Eq. Jur., sec. 604; *Weeks v. Weeks*, 5 N. H. 326, and cases. But the remainderman may have security ordered in such cases where it is shown that there is real danger that the property will be wantonly wasted or fraudulently secreted or removed: 2 Kent's Com. 354; *Homer v. Shelton*, 2 Met. 194; *Hudson v. Wadsworth*, 8 Conn. 348; *Langworthy v. Chadwick*, 13 Id. 42.

The early cases in this country were cases of specific bequests, or the principles applicable to that class of cases were applied to them without noticing the distinction: *Gillespie v. Miller*, 5 Johns. Ch. 21; *Westcott v. Cady*, 5 Id. 334 [9 Am. Dec. 306]; *De Witt v. Schoonmaker*, 2 Johns. 243; *Weeks v. Weeks*, 5 N. H. 326. The general principle applicable to that class of cases is also stated in 2 Kent's Com. 354, and the chancellor then adds: "Where there is a general bequest of a residue for life, with remainder over, the practice now is to have the property sold and converted into money by the executor and the proceeds safely invested, and the interest thereof paid to the legatee for life." And he cites *Howe v. Earl of Dartmouth*, 7 Ves. 137.

This same distinction was soon made in New York, and the principle of *Howe v. Earl of Dartmouth*, 7 Ves. 137, was introduced and distinctly adopted in the courts of equity in that state: *Covenhoven v. Shuler*, 2 Paige, 132 [21 Am. Dec. 73]; *Williamson v. Williamson*, 6 Id. 298; *De Peyster v. Clendining*, 8 Id. 295; *Cairns v. Chaubert*, 9 Id. 160; *Spear v. Tinkham*, 2 Barb. Ch. 211; also in Pennsylvania: *Kinnard v. Kinnard*, 5 Watts, 108; *Eichelberger v. Barnetz*, 17 Serg. & R. 293; so in Tennessee: *Henderson v. Vaulx*, 10 Yerg. 30; *Woods v. Sullivan*, 1 Swan, 507; and also in Maryland: *Evans v. Iglehart*, 6 Gill & J. 171; *Wootten v. Burch*, 2 Md. Ch. 190; and in Alabama: *Harrison v. Foster*, 9 Ala. 955.

The same principle has been recognized in this state, though we are not aware that the question has ever arisen directly, or been decided before. In *Marston v. Carter*, 12 N. H. 164, which was a case of a specific bequest of certain household furniture, and the plaintiff was claiming to hold this furniture

by virtue of the trustee process, upon the debts of the husband of the tenant for life, and it was contended that if the property itself could not be holden absolutely, yet the use of it could, and that the use, during the life of the tenant for life, should be sold, Parker, C. J., says: "If creditors could reach it [this furniture] in any way, it would seem to be by proceedings in equity, resulting in the sale of the property itself, an investment of the fund for the benefit of those interested, and a payment of the income to the creditor during the existence of the life estate. Whether that can be done in the case of a specific bequest of the use of a chattel, we need not now inquire. Where there is a general bequest of a residue for life, with remainder over, the practice is to have the property sold and the proceeds invested: *Vide*, 2 Kent's Com. 354, and notes."

We think the general principle followed in *Howe v. Earl of Dartmouth*, 7 Ves. 137, and the subsequent English cases, should be fully adopted in this state, as it has been by the courts in this country generally, although the instances requiring its application are much fewer with us than in England. It has become well settled here, that, where there is a pecuniary or a residuary bequest for life, with a limitation over, the executor will be bound to protect the interests of those in remainder, by requiring security from the legatee for life, or by converting the fund into cash and investing it for the benefit of all who are entitled under the will. This general rule, which is designed simply to give effect to the intention of the testator, will, however, yield wholly or in part whenever he manifests an opposite or different intention, or when it cannot be applied without defeating the purposes of the bequest. Where money, or property meant to be converted into money, is bequeathed, there is no hardship in requiring security before payment or delivery to the legatee, because, if he is unable to give security, the object of the testator may be equally well attained by investing the fund and allowing him to receive the interest. But when books, furniture, or other specific chattels, are specifically bequeathed by will, the presumption is, that the testator intended that they should be used by the legatee in the form in which they were given; and as they must be delivered to him *in specie*, in order to effectuate this intention, security will not be required, because requiring it would defeat the bequest in case the legatee were unable to give it. In such cases, only an inventory is required.

But it is said that the presumption of equity is so strongly against a course which necessarily interferes with the equalization of the bequest between the legatee for life and those in remainder, by compelling the latter to take the property subject to the deterioration which it has undergone by the lapse of time and by use, that, when specific chattels, instead of being given specifically, form a part of a general residuary bequest for life, with limitations over, the object of the testator will be presumed to have been to give the first taker the mere interest on the fund, and the executor will be bound to convert the whole into cash, and either invest it for the purposes of the will, or pay it over on receiving security for the principal, as in case of a pecuniary legacy.

In *Covenhoven v. Shuler*, 2 Paige, 122 [21 Am. Dec. 73], after stating the rule applicable to a specific bequest of certain articles, the court said: "But none of these principals in relation to specific bequests of particular articles, whether capable of a separate use for life or otherwise, are applicable to this case. Where there is a general bequest of a residue for life, with a remainder over, although it includes articles of both descriptions, as well as other property, the whole must be sold and converted into money by the executor, and the proceeds must be invested in permanent securities, and the interest or income only is to be paid to the legatee for life. This distinction is recognized by the master of the rolls in *Randall v. Russell*, 3 Mer. 193. He says, if such articles are included in a residuary bequest for life, then they are to be sold and the interest enjoyed by the tenant for life. This is also recognized by Roper and Preston as a settled principle of law in England: Preston on Legacies, 96; Roper on Legacies, 209; see also *Howe v. Earl of Dartmouth*, 7 Ves. 137, and cases in notes."

Let us, then, examine the will before us, with a view to learn the intentions of the testator. We are not so much to follow any particular words or phrases as to gather from the whole the testator's real intent. Thus we have already seen that the provisions of the will, by which the property is given to the widow in part for life, and in part in fee, is really a residuary bequest. At her decease one half the testator's property goes to trustees; but should his sisters outlive his widow, their annuity is to be paid during their lives, and, of course, after the decease of the widow it must be paid from her estate, which would be her half of the whole. One half the property being given to her, subject to the payment of the annuity, is

simply charging that annuity upon her half of the property, during the lives of the sisters, with remainder to herself in fee. It is so held in *Howe v. Earl of Dartmouth*, 7 Ves. 137, where the same words "subject to" are used.

We find a similar case in *Slanning v. Style*, 3 P. Wms. 334, where the testator, in his will, having charged the residue of his personal estate with forty pounds per annum to his wife, to be paid quarterly, the executor was ordered to bring before the master sufficient in bonds and securities to be set apart to secure this annuity. Here the widow may die before the testator's sisters, and should she spend her half of the property, which is possible, then the other half going to the trustees at her decease, the sister's annuity would fail unless some security were given.

We think that, in order to carry out and secure the performance of the testator's wishes and intentions, the executors should set apart an amount of stock or bonds sufficient to meet this annuity from the income; and that thereupon the balance of one half of the whole estate, after deducting what is specifically given to the widow, be paid over to her by the executors; all which half is to be taken from the personal property and the avails thereof, unless she choose the real estate in Portsmouth as a part of it. It is evident that the testator intended the farm in Hampton should go to the trustees as a part of their half, from the disposition which he directs them to make of it. We find nothing in this will to indicate that the testator did not intend that the general rule should apply, that whatever property is of a perishable nature, so that the interest of the remainderman in the same would not be equal by the year to that of the tenant for life, shall be disposed of, and the amount invested in permanent funds or securities, and that the tenant for life receive the income thereof during her life.

There is nothing in the fact that real and personal estate are bequeathed together at the same time, and that it is evident that the testator intended the real estate, or at least the Hampton farm, shall remain unsold, and be enjoyed *in specie*. That is one of the points decided in *Howe v. Earl of Dartmouth*, 7 Ves. 137, viz.: That a bequest or devise of real estate for life, with remainder over, is always to be treated as a specific devise, of which the tenant for life is to have the use, possession, and income during life; but that a bequest of personal property will not be held to be specific, merely from being combined with a devise of land.

But in this case the testator gives to his wife all his property in possession, and all and every contingent interest arising or growing out of any property now in his possession or in expectancy, subject, etc. Now, here is not only nothing to show that the bequest was intended to be specific, but the general form of it, giving all his property, etc., and the fact that he afterwards selects out a portion, which he enumerates, and gives to her specifically, shows that he did not consider the first bequest specific, or intend that it should be; also his specifying that all and every contingent interest in possession or in expectancy should be hers, shows that he did not expect or intend that these things were to be specifically enjoyed by her for life in the condition they were then in, but that these interests should be converted into something substantial and permanent, capable of furnishing income or interest as capital.

Applying the rule, then, in *Howe v. Earl of Dartmouth*, 7 Ves. 137: to this case, it seems to us plain that the shipping should be converted into money, and the avails invested in permanent securities. These ships may last many years. Ordinarily, they earn money fast while they are prosperous, but are likely to be of short continuance. The casualties to which they are exposed are so numerous and so great that the chances are that many, if not all of them, would perish during the life estate. Let the executors convert this property into permanent interest-bearing securities.

As to the amount of profits realized from the shipping, being \$17,643.68 for about eighteen months, or nearly \$12,000 a year, on a capital of \$29,750, at its appraised value, it is evident that if the tenant for life is to have that amount as income merely, she will fare infinitely better than those in remainder. She will be likely to get not only large income, but to wear out or use up the principal during her life, and thus get the whole of the principal and interest herself, and leave nothing to those in remainder. The principle to govern in this regard is stated in *Howe v. Earl of Dartmouth*, 7 Ves. 137: "As in the one case that in which the tenant for life has too great an interest is melted for the benefit of the rest, in the other that of which, if it remained *in specie* he might never receive anything, is brought in, and he has immediately the interest of its present worth." So that, on the same principle, a personal annuity not to commence in enjoyment till the expiration of twenty years from the death of the testator, and even then payable on a contingency, this future interest, for

the sake of the tenant for life, should be converted into a present interest in order to yield an immediate income to the tenant for life.

In *Fearns v. Young*, 9 Ves. 549, the testator bequeathed to his wife the interest or income of one half of his property for life, with liberty to dispose of half of said half, and the other half of that half, at her decease, to his daughter, and the whole of the other half to his daughter. The testator had an interest in a partnership which had thirteen months to run after his decease, and his share of the profits during that time amounted £2,070 13s., payable, one half in one year and the other half in two years after the termination of the partnership: *Held*, that the wife was not entitled to one half of this sum as income, but that this amount was to be treated as capital, that the interest should be sold for its present worth, and the wife receive half the income of that fund as interest, which would make the interest of the tenant for life and the remainderman equal by the year. "The rule," said Lord Eldon, "as to personal estate is, that what is not specifically given and consists of an interest wearing out, or an interest at present salable, but, in point of enjoyment future, the whole is converted into money in a question between the tenant for life and the remainderman." Each thus shares equally in the interest: *Cairns v. Chaubert*, 9 Paige, 160, is also a strong case in point.

All the profits or income of the shipping since the testator's decease, together with all the avails of the shipping when sold, are to be invested as capital, after paying the wife a proper amount of interest upon the clear principal during the process of administration. Also the advance in the Columbus, Piqua, and Indiana railroad bonds was properly accounted for as principal by both the executors. Mrs. Toppan cannot take the shipping or any other property at the appraisal and account for it at that sum as tenant for life of the property. The executors might have done this in ordinary cases, but they have not done it in this case. Neither of the accounts as rendered attempts or claims this. This case does not stand any differently from what it would if the executors were indifferent or disinterested persons. They will settle the estate as though neither of them had any interest in the avails of the property, and pay over to the widow as directed.

The half that is to go to the trustees at her death may be held by the executors in trust, to be safely invested in permanent

interest-bearing securities, for the benefit of the estate, the income to be paid to her, and the stock at her decease to go to the trustees. Where moneys are received as the proceeds of what are termed wasting securities, such as leasehold estates, which in progress of time will expire, or perish, or become of greatly diminished value, — if the funds are held on a trust by which the income is to be paid for life to certain persons, and on their decease the remainder is given to other persons, it will be the duty of the trustees to add such dividends or moneys to the principal fund, so as to preserve it unimpaired for those entitled in remainder: *Balch v. Hallet*, 10 Gray, 402, and cases cited; *Kinmouth v. Brigham*, 5 Allen, 271.

The question arises as to the amount which the tenant for life is to receive as interest or income while the estate is in progress of settlement; for during this period the income and dividends are to be received by the executors, and charged to them in their account; and when they settle with the tenant for life, some rule must be adopted as to the amount which she is to receive upon all the personal property found in the executor's hands. Now, some of this property may have paid four, some five, some six, and some eight per cent, and some, like the shipping, may have made forty per cent, but much of that amount at the expense of a large depreciation in the capital. All this capital and income is to be charged to the executors, or rather they are to be charged with all this income, and with the amount the shipping sells for, and for all the other property, and upon this whole sum, as capital, the tenant for life should receive such an income as will make it worth the same to her annually that it will be worth to the remainderman.

We find the English decisions are not uniform on this point; some holding that the tenant for life is entitled to nothing till the expiration of a year from the time of the testator's death: *Stott v. Hollingworth*, 3 Madd. 161; others, that such tenant for life during said year will take the income of such parts of the estate as are properly invested at the testator's death, or may become so invested during that year: *La Terrier v. Bulmer*, 2 Sim. 18; others still, that the tenant for life is entitled to the income of the property in its existing state during the first year from the testator's death: *Angerstien v. Martin*, Turn. & R. 232; and *Douglas v. Congreve*, 1 Keen, 410. But the late cases settle, that the tenant for life is entitled to the amount of the dividends on so much three-per-cent stock as would have

been produced by the conversion of the property at the end of that year: *Dimes v. Scott*, 4 Russ. 209; *Taylor v. Clark*, 1 Hare, 161.

But in *Williamson v. Williamson*, 6 Paige, 298, 304, Chancellor Walworth, after examining the English cases at some length, says: "The result of the English cases appears to be, and I have not been able to find any in this country establishing a different principle, that in the bequest of a life estate in a residuary fund, and where no time is prescribed in the will for the commencement of the interest or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the clear residue, as afterwards ascertained, to be computed from the time of the death of the testator."

And in that case it was held that the executors should pay the tenant for life five per cent upon the clear residue, after deducting debts, legacies, and expenses from the death of the testator. We think the same rule may be applied in this case, with justice to all concerned. The result is, that the executors will proceed to dispose of the shipping to the best advantage they can, will charge themselves with all the income or earnings of the same, and all the avails thereof; also with all the money received on all bonds as principal, and with all interest, income, or dividends from and upon all stocks, bonds, and securities, and money received, and with all the stocks which they find properly invested,—and if any are not so, they must dispose of any such, and account for the amount received,—must charge themselves with the amount of real estate, and of money collected on notes and accounts, with the cash on hand and rents of real estate, in fact, with everything they receive from the estate.

They will credit themselves with paid funeral charges, all debts of the deceased, with interest, as paid, paid for insurance, for repairs of shipping, taxes, all legacies, annuities, and expenses of administration, and any other moneys properly paid out, and they are to deliver to Mrs. Toppan all the property specifically bequeathed to her, and discharge themselves from liability for it by her receipt for the same. All this, deducted from the whole amount received by them, will leave the whole balance of principal and interest or income thereon up to time of settlement. From this balance deduct five per cent per annum upon the clear principal thus found in their hands, to be computed from the death of the testator, and when that

amount is deducted from the whole balance in their hands it will leave the net amount for distribution.

Of this amount one half is to be taken, and after setting aside and safely investing enough of the same to produce a yearly income of six hundred dollars for the testator's sisters during their lives, the balance is to be paid over to Mrs. Toppan. The amount thus set aside to produce the annuity of six hundred dollars will belong to Mrs. Toppan at the decease of the testator's sisters, or if they should survive Mrs. Toppan, then at their decease it will go to her legal representatives.

The other half, including the Hampton farm, is to be held by the executors in trust, to see that said farm is appropriated as the will directs; and to see that all of said half, except the farm, is safely invested, and the income paid annually to Mrs. Toppan during her life; and at her decease, to deliver the same to the trustees appointed in the will.

To ascertain the clear principal, find the sum which, put at interest at five per cent during the time occupied in settling the estate, will produce the balance in the executor's hands, upon settlement. It is simply having the time, rate per cent, and amount given to find the principal.

Decree of the probate court reversed.

RIGHTS OF TENANT FOR LIFE AND REMAINDERMAN IN PERSONAL PROPERTY: See *Covenhoven v. Shuler*, 21 Am. Dec. 73; *Smith v. Barham*, 25 Id. 721; *Field v. Hitchcock*, 28 Id. 288; *Clark v. Clark*, 35 Id. 676; *Saunders v. Haughton*, 57 Id. 581; *Braswell v. Morehead*, 57 Id. 586. The principal case is referred to in *Golder v. Littlejohn*, 30 Wis. 351, on the point that where a bequest is made of the whole personal estate, or the residue after payment of debts, etc., to one person for life, with remainder over, the whole property must be converted into money, and invested in permanent securities, and the income only paid to the legatee for life; but if it can be gathered from the will that the testator intended the legatee for life should enjoy the property in its then condition, the bequest is specific, and the legatee is entitled to the possession and enjoyment of the property.

KINGSLEY v. HOLBROOK.

[45 NEW HAMPSHIRE, 812.]

SALE OF GROWING TREES, WITH RIGHT TO ENTER ON LAND AND REMOVE THEM AT ANY FUTURE TIME, CONVEYS INTEREST IN LANDS within the meaning of the statute of frauds.

SALE OF GROWING ANNUAL CROPS IS SALE OF CHATTELS, it seems, within the meaning of the statute of frauds.

CONVEYANCE OF INTEREST IN LANDS IS REQUIRED TO BE BY WRITING, SIGNED AND SEALED, to be of any validity, under the New Hampshire Revised

Statutes, chapter 130, section 3, but it is good as against the grantor and his heirs, without being witnessed, acknowledged, or recorded.

CONVEYANCE OF INTEREST IN LANDS CANNOT BE DEFEATED, under the New Hampshire Revised Statutes, chapter 131, section 2, by any agreement, unless it be inserted in the condition of the conveyance; and an accompanying writing, signed by the grantee, and purporting to be a defeasance, amounts simply to a contract, which may be modified by a parol agreement, and upon which the grantee is liable if he does not perform its conditions.

GROWING TREES ARE SEVERED IN LAW FROM LAND, AND BECOME PERSONAL PROPERTY without an actual severance, so that they may thereafter be sold like any other personal property, where the owner of the lands, by a valid deed, sells the trees to a third person, or, it seems, where he sells the land, reserving the trees.

TROVER for a quantity of timber. On October 1, 1856, the defendant, Henry Holbrook, and his father, Samuel Holbrook, then the owners of certain lands, sold and conveyed the growing timber thereon to one Asa H. Conant, by an instrument in writing, signed and sealed, but not witnessed or acknowledged. On January 21, 1861, Conant wrote an assignment of the timber, on the back of the deed, to one Robert W. Pratt; and a few days thereafter Pratt wrote a similar assignment thereon to the plaintiff, Alonzo Kingsley. These assignments were not sealed, witnessed, or acknowledged. At the time of the sale from the Holbrooks to Conant, and as a part of the transaction, Conant's agent, who negotiated the sale, signed a paper, which was not sealed, witnessed, or acknowledged, by which Conant agreed "that I will cut and remove all the said timber from the land on which it now stands, within three years from the date hereof, and in failure whereof so to do, I agree to forfeit all the said timber left upon the land where it now is, at the expiration of three years from the date above." The plaintiff objected to the introduction of this writing in evidence, but it was admitted by the court. The plaintiff gave evidence, under objection, of two parol agreements, by which the time of getting off the timber was extended two years. It also appeared that a portion of the timber had been removed; but in March, 1861, the defendant, who had become the sole owner of the land, cut off and retained the remaining timber. The court instructed the jury that Conant, on the face of his deed, had an unencumbered title to the timber, and his assignees, if purchasers in good faith and for value, without notice of any forfeiture, would take a good and unqualified title; but that the writing signed by Conant's agent, although on a separate paper and not under seal, was a good and suffi-

cient defeasance of the deed of the timber to bind Conant, and any of his assignees who had notice of it. The defendant requested the court to charge that no agreement to extend the time for getting off the timber would be binding unless in writing, signed by the party to be charged; that the time limited by the original contract for getting off the timber having expired, the property in the timber was vested in the defendant; and that any agreement thereafter to extend the time would be a mere parol license, not transferable; but the court refused so to charge, and instructed the jury that, although there was a written agreement that the timber should be forfeited if not taken off within three years, yet the parties might modify their contract by a verbal agreement, and that the assignments were good and sufficient to convey Conant's rights. The plaintiff had a verdict, which the defendant moved to be set aside.

Wheeler and Faulkner, for the plaintiff.

Lane, for the defendant.

By Court, SARGENT, J. In Massachusetts and Maine and some other states the courts have held, as stated in 1 Greenl. Ev., sec. 271, and note, that a sale of trees growing upon land is not a sale of real estate, unless it is contemplated that they shall remain so as to receive profit and growth from the growing surface of the land; unless the vendee was to have some beneficial use of the land in connection with the trees. Where such is the case, then a sale of standing trees is a sale of an interest in land, otherwise not. The authorities cited in the plaintiff's brief are in favor of the same view.

This doctrine had its origin, as it would seem, from 1 Ld. Raym. 182, where Treby, C. J., reported to the other judges that the question had arisen before him at *nisi prius*, whether a sale of timber growing upon land ought to be in writing, by the statute of frauds, or might be by parol; and that he had ruled that it might be by parol, because it is but a bare chattel; and it is said that to this opinion Powell, J., agreed. Since then the decisions have been very conflicting, both in England and in this country. Many decisions in regard to growing crops are quoted as bearing upon the question as to whether growing trees are to be considered personal property or an interest in land. These decisions are no less conflicting, however, and aid us very little in establishing any general rule based upon principle.

But we find this distinction noted in *Dunne v. Ferguson*, cited in Stephens's N. P. 1971, from 1 Hayes, 542. The case was trover for turnips. In October, 1830, the defendant sold to the plaintiff a crop of turnips, which he had then recently sown, for a sum less than ten pounds. During the winter following, and while the turnips were still in the ground, the defendant severed and carried away considerable quantities of them, which he converted to his own use. No note in writing was made of the bargain. It was contended for the defendant that trover did not lie for things annexed to the freehold, and that the contract was of no validity for want of a note or memorandum in writing, pursuant to the statute of frauds.

In deciding the case, Joy, chief baron (barons Smith, Pennefeather, and Foster concurring), says: "The general question for our decision is, whether there has been a contract for an interest concerning lands within the second section of the statute of frauds, or whether it merely concerned goods and chattels; and that question resolves itself into another, whether or not a growing crop is goods and chattels. In one case it has been held that a contract for potatoes did not require a note in writing, because the potatoes were ripe; and in another case the distinction turned upon the hand that was to dig them, so that, if dug by A B they were potatoes, and if by C D they were an interest in lands. Such a course always involves the judge in perplexity and the case in obscurity. Another criterion must therefore be had recourse to; and fortunately the later cases have rested the matter on a more rational and solid foundation. At common law growing crops were uniformly held to be goods, and they were subject to all the leading consequences of being goods, as seizure in execution, etc. The statute of frauds takes things as it finds them, and provides for land and goods according as they were so esteemed before its enactment. In this way the question may be satisfactorily decided. If before the statute a growing crop has been held to be an interest in lands, it would come within the second section of the act, but if it were only goods and chattels, then it came within the thirteenth section. . . . And as we think that growing crops have all the consequences of chattels, and are, like them, subject to be taken in execution, we must rule the points saved for the plaintiff."

Growing annual crops for many purposes are and always

have been considered chattels. They go to the executor upon the death of the owner of the land, and not to the heir, and they may be levied on and sold upon execution like other personal chattels. And this being the case when the statute of frauds was enacted, they continued to be so treated and may properly be so now. But the word "land" is a comprehensive term, including standing trees, buildings, fences, stones, and waters, as well as the earth we stand on, and all pass under the general description of land in a deed. Standing trees must be regarded as part and parcel of the land in which they are rooted and from which they draw their support, and upon the death of the ancestor, they pass to the heir as a part of the inheritance, and not to the executor as emblements or as chattels. Neither can they be levied upon and sold on execution as chattels while standing. This being the case when the statute of frauds was passed, it has since then been properly held, we think, that a sale of growing trees, with a right at any future time, whether fixed or indefinite, to enter upon the land and remove them, does convey an interest in the land. It has been so held in this state: *Putney v. Day*, 6 N. H. 430 [25 Am. Dec. 470]; *Olmstead v. Niles*, 7 Id. 522; and more recently in other states: *Green v. Armstrong*, 1 Denio, 550; *Warren v. Leland*, 2 Barb. 614; *Pierrepoint v. Barnard*, 5 Id. 364; *Dubois v. Kelley*, 10 Id. 496; *Buck v. Pickwell*, 27 Vt. 157; *Yeakle v. Jacob*, 33 Pa. St. 376; also in England: *Scorell v. Boxall*, 1 Younge & J. 396; *Teal v. Auty*, 2 Brod. & B. 99.

I think, therefore, that upon the weight of authority and upon reason, the doctrine early established in this state, that a sale of growing timber is ordinarily a sale of an interest in land, is sound and ought to be sustained. Our statute providing for the sale of timber or wood growing or standing on any land, separate from the land, by an administrator under a license from the judge of probate, also declares that such timber or wood shall be deemed to be real estate: R. S., c. 164, sec. 6.

Let us examine the deed in this case and see if it is sufficient to convey an interest in land. Under the law of 1791 in relation to conveyances, it was held that, although a sale of timber to be removed in a certain time conveyed an interest in land, so that the conveyance must be in writing, yet it need not be by deed: *Putney v. Day*, 6 N. H. 430 [25 Am. Dec. 470]; *French v. French*, 3 Id. 234; *Pritchard v. Brown*, 4 Id. 397 [17 Am. Dec. 431]; *Olmstead v. Niles*, 7 N. H. 522. In the last

case cited, Parker, J., says: "Whether the statute of 1829, which repealed the act of 1791, has made any alteration in this respect, is a question which does not arise in this case."

But that question soon after arose, and it was held that by the law of 1829 no conveyance of any interest whatever in real estate could be made, except by deed duly signed, sealed, and witnessed by two witnesses; that, without all these requisites, the deed, or writing, conveyed absolutely nothing to any person; and that it conveyed nothing as against anybody but the grantor and his heirs unless it were also acknowledged and recorded: *Stone v. Ashley*, 13 N. H. 38; *Underwood v. Campbell*, 14 Id. 393. In the last case cited, it is held that under the statute of 1791 a seal is essential in order that an instrument may operate as a conveyance under the statute of uses, 27 Hen. VIII., c. 10, which has been adopted in this state; and that a seal is also necessary that the writing may operate as a conveyance by way of bargain and sale under the same statute of 1791.

The deed in this case is sufficient under the statute of frauds to convey an interest in land, for all that statute requires is, that the conveyance be in writing. This deed is also sufficient under the statute of 1791, as interpreted in *Underwood v. Campbell*, 14 N. H. 393, because it is sealed. But it would be void under the statute of 1829, according to the interpretation of *Stone v. Ashley*, 13 Id. 38, because not witnessed by two witnesses, for this deed is not witnessed at all.

Does the law of the Revised Statutes change the law of 1829 in this respect? The law of 1829 enacted that no deed of bargain and sale, etc., should be valid unless executed in manner aforesaid, which was by being signed, sealed, and witnessed by two witnesses: N. H. Laws, 1830, p. 533. The Revised Statutes, c. 130, sec. 3, provide that every deed or other conveyance of real estate shall be signed and sealed by the party granting the same, attested by two or more witnesses, acknowledged, etc., and recorded, etc.; and section 4 provides that no deed of bargain and sale, mortgage, or other conveyance of any real estate, or any lease, etc., shall be valid to hold the same against any person but the grantor and his heirs, unless such deed or lease be attested, acknowledged, and recorded as aforesaid. It will be seen that the only change contemplated in the Revised Statutes was, that a deed not attested by two witnesses might be good as against the

grantor and his heirs, whereas by the statute of 1829 it was expressly provided that it must be thus attested in order to be good against anybody. As the law now is, the conveyance will not be good, unless signed and sealed, to convey anything to anybody, but it may be good as against the grantor and his heirs without being witnessed, acknowledged, or recorded: *Hastings v. Cutler*, 24 N. H. 481. This deed from the Holbrooks to Conant was therefore sufficient, under the Revised Statutes, being signed and sealed, as against the grantor and his heirs, so that the standing timber which constituted an interest in land passed by this deed to Conant.

The next question is, Was the written agreement or defeasance which was made at the same time with the deed properly admitted? Our statute (R. S., c. 131, sec. 2) provides that "no conveyance in writing of any land shall be defeated, nor any estate encumbered by any agreement, unless it is inserted in the condition of the conveyance and made part thereof, stating the sum of money to be secured or other thing to be performed." The question might perhaps arise whether this does not refer to mortgages only. But we think it is not thus limited. In the original law as passed in 1829 (N. H. Laws of 1830, p. 488), it was provided that no title or estate, etc., in any land, etc., should be "defeated or encumbered by any agreement whatever, unless such agreement or writing of defeasance shall be inserted in the condition of said conveyance and become part thereof, stating the sum, etc., to be secured, or the other thing or things to be performed." There was evidently no intention to change this statute in the revision, and its terms are clearly broad enough in the original act, and must have been intended to cover a case like this.

The written agreement or defeasance should not have been admitted, and of course the other evidence in regard to the extension of the time of getting off the timber was immaterial. The result is, that the deed conveyed the timber absolutely, and this accompanying paper was a contract upon which Conant might have been liable to the Holbrooks, if he did not perform its conditions, and that agreement might be modified by parol. If there had been no modification of that contract, then Conant was to forfeit all the timber he did not get off in three years, and if he did not abide by that contract he would be liable in damages for a breach of it. But if it was modified and the time extended, then he might not

be liable. But the deed conveyed the timber to Conant absolutely.

If the parties here intended to make a conditional deed, the condition should have appeared in the deed, and then the title or interest would have been held subject to that condition, as in any other case of a conditional deed.

This writing was also improperly admitted upon another ground. Since we hold that the property conveyed was an interest in land, which can only be conveyed by an instrument under seal, this writing, in order to have operated as a defeasance, must have been also under seal, which is not the fact; so that, independent of our statutes, the writing was not admissible in evidence: *Lund v. Lund*, 1 N. H. 41 [8 Am. Dec. 29]; *French v. Sturdivant*, 8 Greenl. 246; *Bickford v. Daniels*, 2 N. H. 71; *Runlet v. Otis*, 2 Id. 167; *Wendell v. N. H. Bank*, 9 Id. 404, 419.

Let us next see whether the assignments from Conant to Pratt, and from Pratt to Kingsley, were sufficient to pass the title on this timber. These assignments are in writing and signed by the grantor, but are not sealed, witnessed, or acknowledged. The assignments are sufficient, under the statute of frauds, to pass an interest in land. But, under the Revised Statutes, they would not be sufficient to pass an interest in real estate, upon the authority of *Stone v. Ashley*, 13 N. H. 38, and *Underwood v. Campbell*, 14 Id. 393, not being under seal. And it becomes necessary here to review the grounds of those decisions, because, upon another ground, we hold these assignments to be sufficient.

It is held in *Bank of Lansingburgh v. Crary*, 1 Barb. 542, that growing trees or grass may be severed in law from the land and become personal property without an actual severance; as where the owner of the land in fee, by a valid deed of conveyance in writing, sells the trees or grass to a third person, or where he sells the lands, reserving the timber, trees, or grass. In both these cases, the timber, trees, and grass become chattels, distinct from the soil, and go to the executor instead of to the heir. For in contemplation of law they are abstracted from the earth: Toller on Executors, 194; 3 Bac. Abr. 64. So in *Green v. Armstrong*, 1 Denio, 550, it is said an interest in that which is land can only be created by deed or written conveyance, and no contract for the sale of such an interest is valid unless in writing. It is not material and does not affect the principle, that the subject of the sale will be

personal property when transferred to the purchaser. If, when sold, it is, in the hands of the vendor, a part of the land itself, the contract is within the statute.

In *Warren v. Leland*, 2 Barb. 613, it is held (Paige, J.) that growing trees, being parcel of the land, are within the statute of frauds, and cannot be sold or conveyed except by deed or conveyance in writing, but that such growing trees by a valid sale in writing, by the owner of the fee in the land, are severed in contemplation of law, from the land, and become chattels personal without any actual severance; and after such severance from the land by the original sale may be conveyed, like any other personal property, by parol; and that when such conveyance of the growing trees by the owner of the fee does not limit the time for the entry of the grantee upon the land to cut and remove the trees, a right of entry passes for an indefinite or reasonable time for the removal of all the trees. It is held that growing trees, when they are the subject of an ownership distinct from the ownership of the soil, are no longer deemed as annexed to the realty, but are regarded as entirely abstracted or divided therefrom. They are then regarded as chattels personal merely, like growing crops of grain or vegetables, which are the annual produce of labor and of the cultivation of the earth: *Evans v. Roberts*, 5 Barn. & C. 829; *Stukely v. Butler*, Hob. 300, *168.

This distinction is noticed by Perley, C. J., in *Keyser v. School District*, 35 N. H. 480, where he says: "Certain individuals united to erect a building for a school-house on land belonging to another. This being done by license of the landowner, the building would be personal property, and would belong to those who erected it. The proprietors of the building would have no interest in the land, the building would be mere personal property, and each proprietor might sell his share without deed or other writing, as in case of other personal property owned in common with others": See cases cited.

The assignments in this case, then, were good to convey the interest in the trees, such interest having been severed by the first sale by the Holbrooks, who then owned the fee in the land, and having thus become chattels personal, Kingsley might properly bring this suit: *Cudworth v. Scott*, 41 N. H. 456; *Plumer v. Prescott*, 43 Id. 277. The verdict will not be set aside because the writing of defeasance was wrongfully admitted, as the ruling was against the prevailing party.

Judgment on the verdict.

WHETHER SALE OF GROWING TREES IS SALE OF INTEREST IN LAND within the statute of frauds, is a question upon which there is an irreconcilable conflict of authority. By one line of cases the question is answered in the affirmative: *Teal v. Auty*, 2 Brod. & B. 99; S. C., 4 Moore, 542; *Scorell v. Bazall*, 1 Younge & J. 396; *Kennedy v. Robinson*, 2 Craw. & D. 113; *Rhodes v. Baker*, 1 I. R. C. L. 488; *Owens v. Lewis*, 46 Ind. 488; S. C., 15 Am. Rep. 295; *Armstrong v. Lawson*, 73 Ind. 498; *Cool v. Peters Box and Lumber Co.*, 87 Id. 531; *Harrell v. Miller*, 35 Miss. 700; S. C., 72 Am. Dec. 154; *Putney v. Day*, 6 N. H. 430; S. C., 25 Am. Dec. 470; *Olmstead v. Niles*, 1 N. H. 522; *Howe v. Batchelder*, 49 Id. 204; *Slocum v. Seymour*, 36 N. J. L. 138; S. C., 13 Am. Rep. 432; *Green v. Armstrong*, 1 Denio, 550; *Bank of Lansingburgh v. Crary*, 1 Barb. 542, 545; *Warren v. Leland*, 2 Id. 613; *Pierrepont v. Barnard*, 5 Id. 364; *Silvernail v. Cole*, 12 Id. 685; *Bennett v. Scutt*, 18 Id. 347; *Vorebeck v. Roe*, 50 Id. 302; *Goodyear v. Vasburgh*, 57 Id. 243; *McGregor v. Brown*, 10 N. Y. 114; *Killmore v. Howlett*, 48 Id. 569, 570; *Mizell v. Burnett*, 4 Jones, 249; S. C., 69 Am. Dec. 744; *Yeakle v. Jacob*, 33 Pa. St. 376; *Huff v. McCauley*, 53 Id. 206, 210; *Pattison's Appeal*, 61 Id. 294; *Bowers v. Bowers*, 95 Id. 477; *Buck v. Pickwell*, 27 Vt. 157; *Ellison v. Brigham*, 38 Id. 64; *Sterling v. Baldwin*, 42 Id. 306; *Macdonnell v. McKay*, 15 Grant's Ch. 391; *Summers v. Cook*, 28 Id. 179; and see Benjamin on Sales, 4th Am. ed., by Bennett, sec. 120; 1 Washburn on Real Property, 6th ed., 14. A number of these cases, however, rather turn on the point that in them the agreement was not made with a view to the immediate severance of the timber. In *Owens v. Lewis*, *supra*, Buskirk, J., thus states the doctrine: "A parol agreement for the sale of growing trees, the trees to be severed and taken from the land by the vendee, as in this case, will amount to a license for the vendee to enter upon the vendor's land for the purpose of making such severance; and if such license is not revoked before the trees are severed, the title to the trees will vest in the vendee, and the license after severance will become coupled with an interest and irrevocable, and the vendee will have a perfect right to enter and remove the trees thus severed; but if before the trees are severed, the vendor should revoke such license, no title will pass to the vendee, and no rights will vest by virtue of such contract." This view is maintained by a number of the above decisions, including those from Indiana, and virtually by the following from Massachusetts: *Clafin v. Carpenter*, 4 Met. 580; S. C., 38 Am. Dec. 381; *Nettleton v. Sikes*, 8 Met. 34; *Nelson v. Nelson*, 6 Gray, 385; *Douglas v. Shumway*, 13 Id. 498, 502; *Giles v. Simonds*, 15 Id. 441; S. C., 77 Am. Dec. 373; *Burton v. Scherpf*, 1 Allen, 133, 135; *Parsons v. Smith*, 5 Id. 578, 580; *Drake v. Wells*, 11 Id. 141; *Delaney v. Root*, 99 Mass. 546, 548; *White v. Foster*, 102 Id. 378; *Poor v. Oakman*, 104 Id. 309, 316.

On the other hand, a sale of growing trees is held to be a sale of chattels only: 1 Greenl. Ev., sec. 271; *Anonymous*, 1 Ld. Raym. 182; *Bostwick v. Leach*, 3 Day, 476, 484; *Byasse v. Reese*, 4 Met. (Ky.) 372; S. C., 83 Am. Dec. 481; *Cain v. McGuire*, 13 B. Mon. 340; *Erskine v. Plummer*, 7 Me. 447; S. C., 22 Am. Dec. 216; *Smith v. Bryan*, 5 Md. 141; S. C., 59 Am. Dec. 104; *Purner v. Piercy*, 40 Md. 212; and see *Smith v. Surman*, 9 Barn. & C. 561; S. C., 4 Man. & R. 455; but the reason for so holding in several of these cases was that the sale was made in prospect of immediate separation from the land. This distinction was observed in the most recent English case on this subject, that of *Marshall v. Green*, L. R. 1 C. P. D. 35; S. C., 33 L. T. 404, in which it was decided that a sale of growing timber, to be taken away as soon as possible by the purchaser, is not a contract for the sale of land, or

any interest therein, within the statute of frauds; Coleridge, C. J., saying: "The proposition is, that where the thing sold is to derive no benefit from the land, and is to be taken away immediately, the contract is not for an interest in land." An agreement for the sale of trees growing in a nursery, and raised to be sold and transplanted, seems plainly not a contract for the sale of an interest in or concerning lands, within the statute: *Whitmarsh v. Walker*, 1 Met. 313.

LAWRENCE v. SMITH.

[45 NEW HAMPSHIRE, 583.]

CITIZEN OF ONE STATE, IF DULY SERVED WITH TRUSTEE PROCESS IN ANOTHER, MUST APPEAR AND ANSWER, or judgment will be rendered against him upon his default; but he will not be charged as trustee, if it appears on disclosure that he had no property of the principal debtor in the latter state, and is not liable to him upon any debt or contract to be paid or performed therein.

DEBT on a judgment. The defendant, a citizen of Massachusetts, was served with process, as trustee of one Ramsbottom, while temporarily in New Hampshire. The defendant made default in the original action, and judgment was rendered against him. It was agreed that judgment in the present action should be entered for the plaintiff or the defendant, according to the opinion of the court.

J. S. H. Frink, for the plaintiff.

W. B. Small, for the defendant.

By Court, BELL, C. J. It is entirely immaterial in this case whether the proceedings are regular or otherwise, or whether they are erroneous or not, if the court had jurisdiction of the cause and of the parties. The law has provided certain modes of proceeding for setting aside the judgments of courts if they are irregular, and for reversing them if erroneous; and all parties are bound to resort to these legal remedies, if they have occasion. But so long as the judgment of a court of competent jurisdiction to try and determine cases of the same class, founded upon such notice of the proceeding as the law requires, to give jurisdiction of the parties, remains in force, and is not set aside nor reversed, it cannot be revised collaterally. In a suit founded upon such judgment, the record is incontrovertible, and every other court is bound to assume that the judgment is rightfully and properly rendered. In the case of the higher courts of general jurisdiction, any departure from the usual course of proceeding constitutes an

irregularity, or error at most, though in the case of very inferior tribunals, the jurisdiction may be limited to particular modes of procedure. The jurisdiction of every court as to the case and person is always open to inquiry; and if it appears or is shown that a judgment was rendered by a court without jurisdiction, the judgment will be held a mere nullity.

That the court here had jurisdiction of all cases of foreign attachment is not questioned, and it is not understood to be questioned, that, if the suit had been against the present defendant, as the principal defendant in that case, the service of the writ was quite sufficient, and the jurisdiction of the court, as to the person of the defendant, perfect. The same rules apply to both.

But the position taken by the defendant is, that the court has no jurisdiction over the property of the principal defendant in the hands of the supposed trustee, though the process is properly served on both the principal defendant and the trustee, because the court, in proceedings of this kind, must have jurisdiction over the property alleged to be in the hands of the trustee, as well as over the person of the trustee. It is clear, that in all actions at law of a local character, that is, where the subject of the litigation is land or its incidents, the court must have jurisdiction of the property, or the judgment will not bind the title to it. So that the question here is, whether a person, who has in his hands personal property of a debtor for which he might be rightfully charged as trustee in the courts of his domicile, can be charged as trustee for the same property in the courts of any other jurisdiction in which he and the debtor may be found, and duly served with process.

The general principle is very clear that *debitum et contractus sunt nullius loci*, — debts and obligations are not local. They are incident to and accompany the person wherever he may be found, so that, as the general rule, a debtor, or contractor, or party answerable for personal property, is chargeable in any place where he is served with process. It is contended that the case of the trustee process is an exception to this rule; that it is not enough that a party is regularly served with the process of the court within the jurisdiction where he is at the time. He cannot be charged as a trustee except in the jurisdiction where he resides.

“Proceedings by creditors against the personal property of their debtor in the hands of third persons, or against debts due to him by third persons, are treated as in some sense proceed-

ings *in rem*. In all these cases the same principle prevails that the judgment acting *in rem* shall be held conclusive upon the title and transfer and disposition of the property itself, in whatever place the same property may afterwards be found, and by whomsoever the latter may be questioned, and whether it be directly or incidentally brought in question. In the last class of cases, we are specially to bear in mind that to make any judgment effectual the court must possess and exercise a rightful jurisdiction over the *res*, and also over the person, as far as the *res* is concerned, otherwise it will be disregarded. And if the jurisdiction over the *res* be well founded, but not over the person, except as to the *res*, the judgment will not be either conclusive or binding upon the party *in personam*, although it may be *in rem*": 1 Greenl. Ev., secs. 542, 543.

In *Jones v. Comings*, 6 N. H. 497, it appeared by the writ that the plaintiff and the principal defendant were inhabitants of another state. The trustee, in his plea, alleged that he was an inhabitant of the state of Vermont. The plea was held to be in its nature a plea to the jurisdiction of the court, and as such clearly bad. The action was brought in the proper court, — if any court of the state had jurisdiction, — and the trustee was required to answer further. But it was held that if all the parties should be found to be inhabitants of another state, the trustee could not be charged in the suit unless he had goods of the principal in his hands in this state at the time the writ was served upon him, or had contracted to pay money, or deliver goods to the principal at some particular place in this state. In general, mere choses in action are to be considered, with respect to a suit of this kind, as local, and not as following the person of the trustee to any place where he may be transiently found. This decision is placed on the ground that the court have jurisdiction in trustee suits where the trustee is resident in another state, and that under proper circumstances the trustee may be charged, though it appears that all parties are resident out of the state.

In *Sawyer v. Thompson*, 24 N. H. 510, no one of the parties was ever domiciled in the state. Woods, J., says: "Mere choses in action are considered with reference to the trustee process as local, and not as following the person of the trustee wherever he may transiently be found. The trustee and principal debtor are described as inhabitants of the state at the date of the writ; but that is not decisive of the fact, and cannot conclude the party upon that point. The ruling in

favor of the trustee did not rest simply upon the ground of the foreign residence of the trustee, but also upon the ground that he owed no debt or duty to the principal to be performed here. The issue will not preclude the right to make the defense relied upon. It is not merely whether the trustee has goods, money, or credits of the principal debtor in his hands, but whether he has them under such circumstances that he is answerable for them in this jurisdiction where he is summoned. . . . A chose in action in reference to the foreign attachment process stands upon the same ground as chattels of the principal debtor found in possession of the trustee, located and deliverable by him in another state. The trustee is no more answerable for the chose in action payable in a foreign jurisdiction than for the goods that are located there."

In *Young v. Ross*, 31 N. H. 201, where in process of foreign attachment the parties were all non-residents, but the trustee being in this state temporarily, and having in his possession notes and money belonging to the principal defendant, the process was served upon him here, and the principal afterwards appeared and answered to the action, it was held that the trustee was chargeable. Voluntary appearance gave the court jurisdiction so far as the principal defendant was concerned: *Libbey v. Hodgdon*, 9 Id. 396. The trustee contended that, as he resided in the state of Maine, and was in this state at the time the writ was served upon him only for a temporary purpose, the court had no jurisdiction to charge him as trustee, notwithstanding he may have had the two notes and the proceeds of the others belonging to the principal defendants in his possession in this state when service was made upon him. Upon the principle that where an attachment is made the court obtains jurisdiction and the service may afterwards be completed and judgment obtained, the trustee must be held. The property was attached while in his possession in this state. If he had not had the property with him, but had left it at his residence in Maine, it could not be said that it was attached here. The two last cases are evidently decided upon the authority of the case of *Jones v. Comings*, 6 N. H. 497, and sustain that decision.

Upon these decisions, with which there is none here in conflict, we think that the law may be stated that the inhabitants of other jurisdictions, upon whom service of process is made within our jurisdiction, are bound to appear and answer to the action, and make their defense; and if they neglect to appear

after due notice, judgment will be and may rightfully be entered against them on their default. The court, by the due service of the process, acquire jurisdiction of the person, so that judgment may be properly rendered against them if they do not answer. If on disclosure it appears that the trustee had not, at the time of the service of the process, any property of the principal defendant in this state, and was not holden upon any debt or contract to be paid or discharged in this state, he will not be charged; not for want of jurisdiction of the case and person and subject-matter, but because the courts here hold that in such case the trustee is not chargeable, since their judgment will not affect the title to property out of the state, and consequently the trustee could not be protected by it.

Here there was no disclosure. The trustee was duly summoned, and had opportunity to show his case, but did not. He thereby admitted the charge in the writ, and was justly charged on his default. If he had had nothing in his hands, it would be no ground of relief from such judgment. It would not be a stronger case that he had property for which he ought not to be charged, and did not show it. Nothing in this case shows that the trustee had not some property in this state, or some debt payable here, for which, if he had made a disclosure, he would have been properly charged.

Judgment for the plaintiff.

JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST GARNISHEE: Note to *Sessions v. Stevens*, 46 Am. Dec. 345.

GARNISHEE CANNOT ATTACK JUDGMENT IN PRINCIPAL ACTION because of mere errors or irregularities: Note to *Sessions v. Stevens*, 46 Am. Dec. 344; *Pierce v. Carleton*, 54 Id. 405; *Gunn v. Howell*, 73 Id. 484; S. C., 62 Id. 785; *Earl v. Matheney*, 60 Ind. 205, citing the principal case.

NON-RESIDENT, WHEN SUBJECT TO GARNISHMENT: See *Molynaux v. Seymour*, 76 Am. Dec. 662, 663.

CASES
IN THE
SUPREME COURT AND THE COURT
OF ERRORS AND APPEALS
OF
NEW JERSEY.

STATE v. MILLER.

[1 VROOM, 363.]

ACT OF LEGISLATURE IS CONTRACT. — Act of legislature granting corporate privileges to a body of men and exempting them from taxation becomes, when accepted, a contract, protected from being impaired, by the constitution of the United States. But if the act reserves the right to repeal, the company take the charter subject to such alteration as the legislature deem expedient.

NO IRREPEALABLE CONTRACT CAN RESULT FROM PROVISIONS IN CHARTER which are made in terms, subject to be altered, amended, or repealed at the pleasure of the power granting them.

WHERE CHARTER PROVIDES THAT RIGHT IS RESERVED TO ALTER OR AMEND It whenever the public good may require, the legislature is the judge when that time comes, as that body is the proper tribunal to determine what the public good requires in all matters of legislation.

MERE GENERAL WORDS OF REPEAL IN ACT will not affect the provisions of charters given to private or municipal corporations; but a provision in an inconsistent act, that "all other acts and parts of acts, whether special, local, or otherwise, inconsistent with the provisions of this act, are hereby repealed," will have that effect.

GENERAL ACT REPEALING PROVISIONS IN CORPORATE CHARTER RELATING TO TAXATION. — Where, by the terms of their charter, which the legislature reserve the right to alter or repeal, a railroad company are to be taxed one and a half per cent on the cost of the road as soon as the net proceeds shall equal seven per cent, and no other tax is to be levied upon them, and a subsequent legislature by a general tax law subjected to taxation the real estate of all private corporations "except those which by virtue of any irrepealable contract in their charters, or other contracts with the state," are expressly exempt from taxation, and where said act repealed all acts whether special or local inconsistent with its provisions, this last general law repeals the provision in the railroad charter and subjects the property of the latter to the system of taxation therein provided for.

CERTIORARI. The opinion states the case.

Little, for the prosecutor.

Vanatta, for the defendant.

By Court, ELMER, J. This *certiorari* is prosecuted by the Morris and Essex Railroad Company to test the legality of the tax assessed for state, county, and township purposes, upon their real estate in the township of Morris, valued at sixty thousand dollars. The principal office of the company is admitted to be in the city of Newark, and this tax is assessed upon their station and track within the bounds of the township of Morris. The fifteenth section of the charter of this company provides that, "as soon as the net proceeds of said railroad shall amount to seven per cent upon its cost, the said corporation shall pay to the treasurer of this state a tax of one half of one per centum on the cost of said road, to be paid annually thereafter on the first Monday of January of each year; provided that no other tax or impost shall be levied or assessed upon the said company." This section has been held to exempt the company from any tax other than that specified, as well before the tax of one half per cent shall become payable to the state as afterwards: *State v. Minton*, 23 N. J. L. 529; *State v. Bentley*, 23 Id. 532.

But it is insisted that the tax law of 1862, under which this tax was assessed, has altered this provision, and subjected this and the other railroad companies in this state, whose charters are repealable to the tax thereby imposed, and has exempted them from any tax payable to the treasurer of the state. The first question therefore to be decided is, whether the charter of the Morris and Essex Railroad is subject to repeal or alteration by the legislature against the consent of the company.

Section 20 of the original charter, acts of 1835, p. 32, declares "that the legislature reserve to themselves the right to alter, amend, or repeal this act whenever they think proper." A supplement, passed in 1836, declares "that the legislature reserve to themselves the right to alter or amend this supplement, or the act to which this is a supplement, whenever the public good may require it." That an act granting corporate privileges to a body of men and expressly exempting them from taxation becomes, when accepted, a contract which is protected by the constitution of the United States from being impaired, is too well established by judicial decisions, by the action of the legislature, and the acquiescence of the people, to

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be questioned. But the weight of authority is equally decisive that if the act reserves a right of repeal, the company takes the charter, and the contract thereby implied or expressed, subject to such alterations as the legislature may deem expedient: Angell and Ames on Corporations, 7th ed., sec. 767, and cases in notes; 3 Kent's Com., 10th ed., 306. No "irrepealable contract" can result from provisions in a charter which are made in terms subject to be altered, amended, or repealed at the pleasure of the power granting them, any more than a contract in any other manner entered into which contains an express provision that it shall be subject to be abrogated or altered at the pleasure of one of the parties, can be considered as an "irrepealable contract." In the cases of *Erie & N. E. R. R. Co. v. Casey*, 26 Pa. St. 301, and *Miners' Bank v. United States*, 1 G. Greene, 553, it was held that where the right to resume the privileges granted was reserved only in cases of their abuse or misuse, the legislature were the sole judges of such abuse or misuse, and could repeal without a judicial investigation. The charter in question reserves the right to alter or amend whenever the public good may require; and that the legislature is the proper tribunal to determine what the public good requires in all matters of legislation is too plain to be questioned. Does, then, the tax law of 1862 alter or amend the provisions in the charter of the prosecutors, exempting them from such a tax as has been assessed on them? This depends upon the determination of the question whether the provisions of that law are plainly inconsistent with that exemption. It is well settled that mere general words of repeal will not affect the provisions of private or municipal corporations. But this law enacts, in very specific and precise terms, that "all other acts and parts of acts, whether special or local or otherwise, inconsistent with the provisions of this act, are hereby repealed."

In the case of *State v. Collectors of Jersey City*, 30 N. J. L. 112, decided at June term, 1862, of this court, it was held, that by virtue of this clause, all the provisions of the charter of Jersey City respecting taxation, inconsistent with it, were thereby altered and made to conform to the general tax law of the state. And, in my opinion, this clause shows a clear intention of the legislature to alter the mode of taxation before prescribed in all other special acts they had the power to interfere with. Section 7 of this law (Acts of 1862, p. 348) enacts "that all real and personal estate within this state, whether owned by

individuals or corporations, shall be liable to taxation in the manner and subject to the exemptions hereinafter specified." Section 8 enacts "that all private corporations of this state, except those which, by virtue of any irrepealable contract in their charters, or other contracts with this state, are expressly exempt from taxation, shall be and hereby are required to be respectively assessed and taxed." Section 13 enacts "that the real estate of private corporations situate within this state shall be assessed to said corporation in the township or ward in which it is located, in the same manner as the real estate of individuals; and the amount of such assessment shall be deducted from the amount of the capital stock and surplus and funded debt, or of the valuable assets of the said corporation."

As these provisions are plainly inconsistent with that part of the act incorporating the Morris and Essex Railroad Company, which requires them, in a certain contingency, to pay a tax to the treasurer of the state, and exempts them from all other taxes, and as the contract in this charter is not an irrepealable contract, but is subject to be abrogated or changed by the legislature, it only remains to inquire whether there is any other contract with the state expressly exempting them. No such contract outside of the charter is alleged. But it is insisted for the company that the words "other contracts with this state" mean any other contracts than irrepealable contracts in their charters, and therefore include repealable contracts in their charters. I am not able, however, to adopt this construction, because it makes the two clauses of the exception in effect contradictory, and rejects the word "irrepealable" as wholly superfluous and unnecessary. If the legislature meant to except from the operation of this law all corporations which are in terms expressly exempted from taxation, this meaning could have been, and doubtless would have been, plainly expressed in unambiguous terms. If the word "irrepealable" had been omitted, and the language had been, "by virtue of any contract in their charters, or other contracts with this state," there could be no doubt of the meaning. But the word "irrepealable" has been used evidently for a purpose, and in my opinion the result is, that the exception does not apply, unless there is a contract in an irrepealable charter, or by some provision other than that contained in the charter itself. The object of the exception evidently was to avoid even the appearance of attempting to pass a law in contraven-

tion of that provision of the constitution of the United States which prohibits the legislature of a state from impairing their contracts, and this object is fully obtained by the construction above adopted.

It was urged that the reserved right to alter or amend was not meant, and cannot fairly be interpreted to reserve the right to alter the prescribed mode of taxation in a charter which not only contains an express exemption from any other mode, but which gives to the state a prospective right to become the owner of the road and all its appendages, upon the payment of its appraised value. The answer, however, is, that the language of the reservation is general, and extends to all the provisions of the charter; and that the stockholders accepted and became parties to a contract, one of the express terms of which is, that the legislature may alter or rescind it whenever, in their opinion, the public good should so require. If hereafter some mode of travel should be discovered, so much superior to the railroad as to make it for the public good that the dangers incurred by the road should be wholly avoided, the charter may be repealed, and the stock rendered valueless. So if the legislature have come to the conclusion that the public good requires them to tax the road as other property in the state is taxed, they have wisely reserved the right to do so; and the company, having accepted the privileges granted to them subject to this right, cannot complain if it is exercised. If the legislature have erred in judgment, and have dealt hardly with this or with other railroads in like circumstances, as to which we have neither the means nor the right to form an opinion, the remedy is not to be sought from the judiciary, but from those whose duty it is to determine what, in this matter, is really for the public good. Some stress was laid by counsel on the inconvenience it was alleged will result from subjecting railroads, which often have real estate extending over large sections of the state, to be taxed in each particular township through which they may run, and from thus requiring all these assessments to be ascertained, and the aggregate amount deducted from the capital stock, at the place where the principal office is situate. But this argument is not entitled to much weight. All the inconveniences on both sides of this question were probably duly considered by the framers of the law; and it is quite possible that in these times of heavy taxation, the inconvenience of depriving many townships of the right to tax valuable real estate within their limits may have

been considered as outweighing the mere difficulty of adjusting the assessment upon the capital stock and accumulated surplus of the company. In my opinion, this tax was rightly imposed, and the assessment must be affirmed.

Assessment affirmed.

POWER OF LEGISLATURE TO ALTER OR REPEAL CHARTER of a public or private corporation is unquestionable where the right so to do is reserved in the charter itself: *Miners' Bank v. United States*, 43 Am. Dec. 115, and note; *Crease v. Babcock*, 34 Id. 61.

PROVISIONS IN CORPORATE CHARTERS, AND ACTS CONFERRING PRIVILEGES UPON THEM, when contracts within the meaning of the constitutional provision that no state shall pass laws impairing the obligation of contracts: See *Yarmouth v. North Yarmouth*, 56 Am. Dec. 666; *Brown v. Hummel*, 47 Id. 431; *Cleghorn v. Cullen*, 53 Id. 450; *Thorpe v. Rutland etc. R. R. Co.*, 62 Id. 625; *Dugan v. Bridge Co.*, 67 Id. 464; *Tinsman v. Belvidere etc. R. R. Co.*, 69 Id. 565; *Coffin v. Rich*, 71 Id. 559, and extensive notes to these cases.

WHEN CORPORATE CHARTER IS CONFERRED UPON BODY OF INDIVIDUALS, subject to change or repeal upon the happening of some event, or when the public good may require, who to judge when contingency occurs: See *Crease v. Babcock*, 34 Am. Dec. 61; *Miners' Bank v. United States*, 43 Id. 115, and extensive note; *Dugan v. Bridge Co.*, 67 Id. 464.

IRREPEALABLE ACT PROVIDING FOR SPECIAL METHOD OF TAXATION, or total exemption therefrom, power of legislature to pass: See *Mott v. Pennsylvania R. R. Co.*, 72 Am. Dec. 664, and note.

REPEALS. — Repeals by implication are not favored in law, but a subsequent statute revising the subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate to repeal the former to the extent to which its provisions are revised and supplied. And though a subsequent statute be not repugnant in its provisions to a former one, yet if it was clearly intended to prescribe the only rules which should govern, it repeals the prior statute: *Rogers v. Watrous*, 58 Am. Dec. 100; *Bruce v. Schuyler*, 46 Id. 447; *Raols v. Kennedy*, 58 Id. 289; *Western Saving Fund Society v. Philadelphia*, 72 Id. 730; *State v. Wilson*, 82 Id. 163, and notes.

THIS CASE IS AFFIRMED in 31 N. J. L. 521, and followed in *State v. Mayor etc. of New Jersey*, post, p. 240.

PHILLIPSBURGH BANK v. FULMER.

[2 VROOM, 52.]

NOT ESTOPPEL. — Declarations of a garnishee that he was indebted to the defendant in a large sum in consequence of which a suit was commenced against defendant, and the debt attached, does not estop such garnishee from denying that he was indebted to the defendant at the time the attachment was issued.

TO CONSTITUTE ESTOPPEL IN PALS, there must be an admission intended to influence, or of such a nature as will naturally influence, the conduct of another, and so change his condition as materially to injure him, if

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the party making it is allowed to retract it. And the estoppel must not be carried beyond the limits of the injury, so as, instead of preventing a fraud, the enforcement of it will produce a greater injury than it was intended to prevent.

IMPROPER INTERFERENCE WITH JURY. — Where it appears that defendant and his sons took up their quarters in different houses of entertainment frequented by the jury, that they paid them unusual civilities and attentions, that they treated them more than once, and where this was done under such circumstances as to render it probable that it was done for the purpose of influencing the jury, a new trial will be granted.

THE opinion states the case.

Depue and Vanatta, for the plaintiff.

Shipman and Zabriskie, for the defendant.

By Court, ELMER, J. An attachment having issued out of this court on the 29th of June, 1861, at the suit of plaintiff against one Matthias Brakely, a debt or sum of two thousand dollars was attached as due to him by the present defendant, John Fulmer. Final judgment having been obtained against Brakely April 3, 1862, for a sum exceeding this amount, a *scire facias* was issued against Fulmer, pursuant to the statute. Fulmer having appeared and pleaded that he was not indebted to Brakely, issue was thereon joined, and upon the trial a verdict was rendered for the defendant that he was not indebted to Brakely. A rule to show cause why the verdict should not be set aside and a new trial ordered having been allowed, two reasons for making it absolute have been relied on.

1. It was insisted that the judge erred in admitting the defendant to produce evidence that in point of fact he was not indebted to Brakely at the time the attachment was issued. The argument urged was, that the defendant, by his own admissions and declarations to the officers of the bank, and on the faith of which the writ of attachment was sued out, was estopped from denying his indebtedness to be what he had stated.

It is a sufficient answer to this that the evidence in regard to the admissions was conflicting, and was not of such a character as to require the judge to decide that there was an estoppel. Giving the declarations their full force, the most that could be claimed for them on the part of the plaintiff was, that it should have been submitted to the jury to decide whether the admissions were such as, under the circumstances of the case, were intended or were in their nature calculated to in-

duce the officers of the bank to act upon them, and upon which they did in fact so act as materially to injure the bank, and so that it would be unjust and fraudulent to set up the real facts of the case, and thus prevent the plaintiff from rendering the defendant liable to pay the amount he had said he owed Brakely. Instead of being asked to submit these questions to the jury, the judge was asked to decide them himself, and to overrule all evidence tending to show what that indebtedness really was.

But I am clearly of opinion that if those questions had been submitted to the jury, they were fully warranted by the evidence in returning the verdict they did, if they were satisfied, as upon this inquiry we must assume, that, after duly considering all the evidence, including the admissions, the defendant was not in fact indebted to Brakely when the attachment was issued. We have not been asked to interfere with the verdict on the ground that in this respect it was against the weight of the evidence.

The admissions relied on were that Fulmer, who had large transactions with Brakely and was connected with him in dealing with the bank, in various conversations which he had on the subject of said transactions, and dealing with the cashier and individual directors previous to the issuing of the attachment and "up to a very short time before it was issued," told them he was indebted to Brakely to an amount sufficient to pay at least all Brakely owed the bank, with the amount and circumstances of which he was well acquainted. The cashier also stated that in consequence of these admissions he was induced to have the writ issued; but it did not appear that the intention to do it was communicated to Fulmer, or that when he made the admission he had any reference to such a proceeding. Now, waiving the uncertainty as to the time when the admissions were made, and the possibility, not to say probability, that the defendant's indebtedness to Brakely, which at times was large, had been discharged by *bona fide* transactions between them, or by Brakely having in good faith parted with Fulmer's negotiable notes which he held after the declarations were made and before the attachment was issued, of which there was evidence that may have satisfied the jury, but taking the facts stated most strongly against the defendant, I think there was no such an estoppel as required a verdict for the plaintiff. At most, the injury to the bank amounted only to rendering it liable to pay the costs of a

further proceeding on the *scire facias*. Salutory as is the doctrine of estoppel *in pais* as a preventive of fraud when confined within reasonable limits, no case has ever gone so far as to render a man liable to pay a debt of two thousand dollars which he did not owe, because in consequence of his false statements that he did owe it a suit was commenced against him, a failure to sustain which would throw the costs on the plaintiff.

To constitute an estoppel *in pais*, there must be an admission intended to influence, or of such a nature as will naturally influence, the conduct of another, and so change his condition as materially to injure him, if the party making it is allowed to retract it. And the estoppel must not be carried beyond the limits of the injury, so as, instead of preventing a fraud, the enforcement of it will produce a greater injury than it was intended to prevent: *Den v. Baldwin*, 21 N. J. L. 403; *Pickard v. Sears*, 6 Ad. & E. 469; *Gregg v. Wells*, 10 Id. 90; *Dezell v. Odell*, 3 Hill, 219 [38 Am. Dec. 628]; *Dewey v. Bordwell*, 9 Wend. 65; *Preston v. Mason*, 25 Conn. 118; *Taylor v. Ely*, 25 Id. 251; *Johns v. Church*, 12 Pick. 557 [23 Am. Dec. 651]; *Bursley v. Hamilton*, 15 Id. 42 [25 Am. Dec. 423]; *Dewey v. Field*, 4 Met. 384 [38 Am. Dec. 376].

The cases relied upon by the plaintiff's counsel do not carry the doctrine of estoppel to the length now insisted on. In *Presbyterian Congregation v. Williams*, 9 Wend. 147, the defendant, in an action of ejectment to recover possession of premises for non-payment of rent, who had declared he had no goods to distrain, was held precluded from setting up the fact that he had such goods, to defeat the ejectment; but that the rent was due was not disputed, so that the estoppel had reference only to the form of the remedy. In *Hall v. White*, 8 Car. & P. 136, a *nisi prius* case, the action was detinue for certain deeds which the defendant had in his letters admitted to be in his possession, and the fact disputed was only whether he had the control of them. In *Martin v. Richter*, 10 N. J. Eq. 510, the admissions were held to have induced the party to whom they were made to suppose a certain amount was due on a bond and mortgage, for which, in consequence of the admissions, he gave value, and it was decided they precluded the person making them from setting up a release. In *Sussex Co. M. Ins. Co. v. Woodruff*, 26 N. J. L. 546, the action was covenant upon a sealed policy, to which there was a plea of *non est factum*. The admission that the policy had been sent to

the plaintiff was held to be conclusive on the company upon the question of delivery, there being no question that the premium had been paid and a policy agreed to be issued; and if the policy was not actually delivered the plaintiff was entitled to his remedy, either by an action of trover or a bill in chancery.

In the case before us, it was not alleged that the bank or its officers had acted upon the admissions in giving credit to Brakely, or so as in any way to change their securities or to affect any rights of action to which resort might be necessary. The sole injury complained of was the liability to costs in consequence of the verdict. If the estoppel could be so used as merely to charge the defendant with costs, or if it was sought to be applied merely to prevent the plaintiff from being turned round to another form of action, it would be a legitimate use of it; but so to apply it as to charge the defendant with the payment of a large sum of money he does not owe, which, if the principle is correct, might as well be twenty thousand as two thousand dollars, to save the plaintiff a few dollars of costs, is to make it the means of working, and not of preventing, a serious injury. If this should be allowed, I do not see why the defendant's admissions to the plaintiff in an ordinary suit may not be claimed to have the same effect, which certainly has never been held. It is true that the bank was a stranger to the transactions between Brakely and Fulmer; but when, by means of the *scire facias*, the plaintiff sought to render the latter liable to the bank for the debt it was alleged he owed to Brakely, the plaintiff assumed Brakely's place, claimed his rights, and became subject to his equities. The issue tried was, not what claims the bank had against Fulmer, but to what amount, if any, was Fulmer indebted to Brakely. I am clearly of opinion that there was no such an estoppel as should have prevented the jury from rendering the verdict they did, and this reason for a new trial has failed.

The other ground relied on for setting aside the verdict and allowing a new trial was, that the defendant and his two sons, who were his main witnesses, and who took up their quarters in different houses of entertainment frequented by the jury, improperly interfered with several of the jurors during the progress of the trial. Considering the great importance of jealously guarding the jury against improper influences, and the reason there is to fear that the practice of endeavoring thus to procure a favorable verdict is becoming more and more

ascertaining the amount of purchase-money and compensation.

But the foregoing decisions, cited from the English books, are not in all respects applicable to the case before this court. They established the rule of the English law with regard to proceedings to acquire title to lands by private corporations. It is not necessary at the present time for this court to express any opinion whether a notice by a railroad company, or other private corporation, to the land-owner, of an intention to take the lands by force of their statutory powers, creates a contract, and places the parties in the relation of vendor and purchaser.

The actors in the proceedings to acquire the lands now in question are not incorporated for private purposes, but, on the contrary, are public officers, acting in behalf of a city. It is obvious that a company who have a franchise given them for the profit of the individual members composing it, stand on a very different footing from that of commissioners who represent a whole community and who have no private interest in their office. In *Regina v. Commissioners of Woods, Forests, etc.*, 15 Q. B. 773, this distinction was recognized. In this case, the commissioners had given notice that they intended to take certain lands for the purpose of forming the park authorized by the act, but afterwards refused to proceed to have the compensation for lands assessed; and upon an application for a *mandamus* the court refused the writ and held that, as the commissioners under the statute were acting in a public capacity, the notice given by them did not constitute a contract. The doctrine of the former decisions, that as between a private company and a land-owner, a notice to treat created a contract enforceable against such company, was not impugned, but it was considered that, on grounds of public policy, the rule should not be extended to the acts of agents of the government acting in behalf of society. This distinction seems eminently proper. It may well be held that a private company, who are actuated solely by the motive of the interest of their stockholders, should not be permitted to retract after having declared, in the statutory form, their intention to take the lands of a citizen on the ground that such declaration is an offer on their part to pay the price which shall be afterwards ascertained in the mode provided by law. As the land-owner has no option, his assent is implied, and thus a contract is formed. Under such circumstances, it can be urged with

emphasis, that a withdrawal of the offer is not to be tolerated, as the parties deal as individuals, with a single eye to their own advantage. Such considerations cannot, with the same force, avail where the proceedings to acquire lands are taken in behalf of the public, for in such case the agent is commissioned to acquire the title for the public good; and if it, therefore, should turn out, before the transaction is closed, that the interest of the public will not be promoted, but, on the contrary, will be impaired by concluding the purchase, it would seem to follow that he ought not to be compelled to proceed. Empowered to make the purchase for the public good, he ought not to be forced to conclude it to the public detriment. I do not think the cases cited, which all arise out of the transactions of private companies, ought to be applied, without a guarded discrimination, to the operations of public agents.

The question then arises, If the notice does not form the contract, what act is necessary to the consummation of the proceedings so as to render it obligatory? In my opinion, that act is the confirmation of the report by the court. It is, then, by the express terms of the act that the land-owner has the right to the money to be paid in a definite time, and on the payment of the money, title passes to the city. It is this confirmation which appears definitively to establish the rights of both parties; and until this event, the public officers can withdraw their application and abandon the proceedings.

The courts of New York have expressed a similar view on the question. Thus, on an application to the supreme court of that state for a *mandamus* to compel the trustees of Brooklyn to file a report of commissioners of estimate and assessment of damages, made in the proceedings commenced by them in the opening of a street, the motion was denied, on the ground that the rights of the respective parties had not become fixed. A confirmation by the court of the estimate and assessment was requisite under the act regulating the procedure, and the refusal of the *mandamus* was justified from this consideration: 1 Wend. 318. In construing a statute containing a provision almost identical with the one now before the court, Chancellor Kent thus expresses himself: "Perhaps the better opinion is, that the corporation are not bound to go on, but may recede and abandon their plan at any time before the commissioners of assessment shall have reported and their report shall have been confirmed in pursuance of the 178th section of the act referred to in the bill. On the confirmation of the report of

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emphasis, that a withdrawal of the offer is not to be tolerated, as the parties deal as individuals, with a single eye to their own advantage. Such considerations cannot, with the same force, avail where the proceedings to acquire lands are taken in behalf of the public, for in such case the agent is commissioned to acquire the title for the public good; and if it, therefore, should turn out, before the transaction is closed, that the interest of the public will not be promoted, but, on the contrary, will be impaired by concluding the purchase, it would seem to follow that he ought not to be compelled to proceed. Empowered to make the purchase for the public good, he ought not to be forced to conclude it to the public detriment. I do not think the cases cited, which all arise out of the transactions of private companies, ought to be applied, without a guarded discrimination, to the operations of public agents.

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the commissioners, rights then became acquired and vested in the parties respectively": *Corporation of New York v. Mapes*, 6 Johns. Ch. 48. A number of other cases to the same purpose will be found collected in *The Matter of Anthony Street*, 20 Wend. 620 [32 Am. Dec. 608].

On these grounds, therefore, this court is of opinion that the commissioners in the present case should be permitted by the circuit court to discontinue their proceedings in question,—but that such discontinuance should be upon such terms as to the payment of the costs and expenses of the land-owners as the said circuit court may deem just.

EMINENT DOMAIN — AT WHAT TIME MAY PROCEEDINGS BE DISCONTINUED. — The exercise of the sovereign power of eminent domain by the people of the state, or by those to whom they have delegated that power, is one to which the exigencies of a progressive community has occasioned resort to be made on a multitude of occasions. These proceedings are instituted for the accomplishment of a large variety of purposes, and in the consummation of numerous enterprises and schemes, which, before the conclusion of the proceedings, may prove to have been unwise, impolitic, inexpedient, or unprofitable. Public officers may discover that a consummation of their original purpose may not be for the public good; private companies, that it would not result in their individual gain. These considerations may lead them to desire to abandon their enterprise and to discontinue their proceedings. But the land-owner may object and claim the compensation which the constitutions assure him must always be paid before private property can be taken for public use.

This raises the question, and it has been one fruitful of discussion, At what stage of the proceedings may they be discontinued by the party seeking to condemn without his being forced to pay to the land-owner the value of his land?

This question is controlled to some extent by the provisions of the different statutes under which the claimant acts in the condemnation proceeding, but certain leading principles dominate the construction of these statutes, making their application practically harmonious. When a party or company have prosecuted proceedings to condemn land to a certain stage, and then desire to discontinue, the important question to be determined is, Have such proceedings gone to the extent of vesting a title to the land in the company? If they have, then the land-owner has acquired a right to the compensation. In the language of the supreme court of Vermont: "The right of the railroad company to take and hold the land for the purpose of constructing and maintaining its road, and his (the land-owner's) right to the money, are correlative and coincident, and vest simultaneously in the respective parties. No voluntary abandonment of the right to take and use the lands when once fully acquired will divest him of the right to the money which has once vested in him." The moment the company acquired the right to the land, the land-owner became entitled to the money: *First Nat. Bank v. West River Railroad Co.*, 49 Vt. 167-174. This principle, that the company have the right to abandon at any time before their proceedings have ripened into a title, appears to be the leading idea governing this question. If the land has once

been taken, if the company for any period of time have been seised and possessed of the land appraised, or if the plaintiff has had at any time a perfected right to the damages awarded by the commissioners, a subsequent change of intention on the part of the company will have no effect to defeat the plaintiff's claim for the damages which have been awarded to him: *Stacey v. Vermont Cent. R. R. Co.*, 27 Vt. 39; *North Missouri R. R. Co. v. Lackland*, 25 Mo. 532; *Leisee v. St. Louis and Iron Mt. R. R. Co.*, 2 Mo. App. 105; *State v. Hug*, 44 Mo. 116; *Baltimore and Susquehanna R. R. Co. v. Nesbit*, 10 How. 395; *Lancaster v. Kennebec Co.*, 62 Me. 272; *State v. Keokuk*, 9 Iowa, 438; *Wilkerson v. Buchanan Co.*, 12 Mo. 328; *Matter of Military Parade Grounds*, 60 N. Y. 319; *Farmer v. Hooksett*, 28 N. H. 244; *Blackshire v. Atchison, Topeka, & S. F. R. R. Co.*, 13 Kan. 514.

Under most of the statutes providing procedure for taking private property for public use, the amount of the compensation to be paid the property owner is determined in this manner: Commissioners are appointed who estimate the value of the property to be taken, and return their report into the proper court, where, if neither party objects, it is confirmed; but if one of the parties objects a jury is then appointed to assess the damages, and upon the verdict of the jury a judgment is rendered.

In Massachusetts, the right of the land-owner to compensation, under the statute of that state, does not attach until the entry of the company upon the land, and consequently an assessment of damages by a jury in the absence of such entry is not enough to entitle him to recover: *New Bedford v. Bristol*, 9 Gray, 346; see *Harrington v. County Comm. of Berkshire*, 33 Am. Dec. 741, and note.

In Indiana, in proceedings by a municipality to condemn land to open a new street, where commissioners have been appointed to assess damages, have made their report, and the report has been accepted by the common council, and an order made appropriating the land for the street, the right of the land-owner to the compensation becomes absolute: *City of Lafayette v. Schultz*, 44 Ind. 97. In New Hampshire it is the acceptance of the report of the commissioners and judgment thereon that fixes the rights of the parties in regard to the land taken: *Farmer v. Hooksett*, 28 N. H. 244. In Tennessee, under a statute permitting certain persons to erect certain dams, by which the lands of others may be flooded, upon making compensation and providing for the assessment of such damage, the court say, in a case where such flooding was caused and proceedings had been commenced to assess the damage, that they "think that an utter abandonment of the contemplated scheme of improvement in good faith, at any time before the final judgment of the court upon the report of the jury, would take away the right of the party injured to insist upon the value of his property and transfer of the title to the company, and leave him to recover such damages under all the circumstances of the case as he may have sustained by the erection of a dam during its continuance. Of course, in such case the abandonment of the enterprise and total removal of the cause of injury must be established by plenary evidence, and the evidence of abandonment must be of a character to be in law binding and conclusive upon the company": *Stevens v. Duck River Navigation Co.*, 1 Sneed, 236. In Missouri, in the case of *Wilkerson v. Buchanan County*, 12 Mo. 328, the court say that the land-owner's right to compensation attaches upon the return of the report of the commissioners or of the jury. But the rule of the later case of *State v. Hug*, 44 Id. 116, is that after assessment of damages to property owners for opening of streets, the city may, at her option, on payment of costs, desist from the undertaking and leave the parties *in statu quo*.

Such assessment does not invest the city with the right of property, nor divest the title of the property holder till payment of the amount assessed.

In New York the rule is as above stated, that until the proceedings have progressed so far as to give mutual rights to the parties, the company seeking to condemn the land have a discretion, and may refuse to proceed; but after rights have become vested thereunder, they cannot discontinue. The New York decisions are unanimous in holding that the exact point of time, when these proceedings ripen into a right on the part of the land-owner to recover the damages assessed, is when the report of the commissioners is confirmed by the court. After the assessment has been made, but before it has been confirmed, the party seeking to condemn the land may consider whether at the sum assessed it would be expedient to continue to work. If at the assessed value the private company should deem the enterprise unprofitable, or the public officers should deem it impolitic, it is to the interest of the former, and is the duty of the latter, to abandon the scheme and discontinue the proceedings, and they may do so. It is incontestibly established that in proceedings to condemn private property for public use, the company may be permitted to discontinue proceedings at any time before rights resulting therefrom have become vested in the property owners, and that such rights are not vested until the report of the commissioners is finally confirmed, and there is a final award in the nature of a judgment in favor of the property owners for their compensation. After the confirmation of this report, the rights of the parties become conclusively established; both parties to the proceeding are bound: *Matter of Washington Park*, 56 N. Y. 144-154; *Martin v. Mayor of Brooklyn*, 1 Hill, 545; *Matter of Canal Street*, 11 Wend. 155; *People v. Brooklyn*, 1 Id. 318; *Matter of Rhinebeck R. R.*, 8 Hun, 34; *Common Council of Brooklyn*, 5 Id. 175; in *Matter of Department of Parks*, 73 N. Y. 560; *Staford v. Mayor of Albany*, 7 Johns. 542; *Matter of Dover Street*, 18 Id. 545; *Hudson River R. R. Co. v. Outwater*, 3 Sand. 689; *Matter of Anthony Street*, 32 Am. Dec. 608, and note; *Matter of Military Parade Grounds*, 60 N. Y. 319.

The rule in Louisiana is the same as in New York, and the rights of parties to the proceedings under discussion become fixed by the confirmation of the commissioners' report. In a case in that state the court say: "Our statute is almost a copy of one in New York regulating the opening and improving of streets. The proceedings are substantially the same. In the execution of that law it appears to have been uniformly considered that until a report is finally approved, even after one has been in part satisfactory, but referred back to commissioners for amendment, no rights are acquired or titles divested. In the case relative to the *Opening of Anthony Street*, 20 Wend. 618, the supreme court of that state fully recognized that doctrine; and the right of the corporation to discontinue proceedings at any time before the final confirmation of the report was distinctly admitted": *Application of Mayor of New Orleans*, 4 Rob. (La.) 357; *City Praying for Opening of Streets*, 20 La. Ann. 497. The rule is the same in Kentucky; if the persons seeking to condemn land are dissatisfied with the assessment, they must discontinue before it has been confirmed. In a case where a city was proceeding to condemn land for street purposes, and afterwards sought to withdraw, the court said: "Having failed before final judgment to dismiss her petition, the city elected to take the property at the adjudged price, and cannot now be permitted of its own motion to annul a contract evidenced by the judgment of a court of record consummated in conformity with the prayer of her own petition. Having failed to avail herself of her right to dismiss her petition, the contract upon

her part to take and pay for the property was made perfect and complete by the judgment of the court, and cannot be rescinded except by the consent of her involuntary vendors": *Duncan v. Mayor of Louisville*, 8 Bush, 98-104. In New Jersey the rule is similar, as will be seen by the principal case, and by the very ably reasoned cases of *Mabon v. Halstead*, 39 N. J. L. 640; and *O'Neil v. Freeholders of Hudson*, 41 Id. 161-173. This confirmation may be by the judgment of the president of the village: *Hawkins v. Rochester*, 1 Wend. 53; or by lapse of time within which an appeal may be taken: *People v. Syracuse*, 20 How. Pr. 491.

A different rule prevails under the statute in the states of Illinois, California, Ohio, Maryland, and Kansas, where the rights of the parties are not fixed until the payment of the compensation to the land-owner, or until it has been deposited for his benefit. In the language of the California court: "The right to take his property in no sense depends upon any contract between him and the public. His assent is not required, and his protestations are of no avail. But under the constitution his property cannot be taken until paid for. Up to that time he holds it as he always held it, subject to the right of the state to take it for public use upon compensating him for it. When so taken, the right to the compensation which the constitution gives him accrues. That right ~~then for the first time~~ ^{from that time} would become, under the constitution, a vested one. Up to that time he ~~partes nihil~~ ^{receives nothing} and the public receives nothing. Prior to that time, no lien is impressed upon the property, or cloud cast upon his title, in consequence of any preliminary proceedings. Nor, indeed, can it be said in any legal sense that the land has been taken until the act has transpired which divests the title or subjects the land to the servitude. So long as the title remains in the individual, or the land remains unchanged by the servitude, there can have been no taking under conditions, which, as already stated, preclude the commission of a trespass. Until the price has been ascertained, the government is not in a position to close the bargain; and when it is ascertained, if the sum is not satisfactory, the government may withdraw. The government is under no obligations to take the land, if the terms, when ascertained, are not satisfactory": *Lamb v. Schottler*, 54 Cal. 319, 327. To the same effect is the language of the Illinois court: "The compensation to be made is for 'property taken or damaged,' and no property shall be taken or damaged until compensation shall be made. The rights of the parties are correlative, and have a reciprocal relation, the existence of the one depending upon the existence of the other. When the party seeking condemnation acquires a vested right to the property, the owner has a vested right in the compensation, but since no vested right can be acquired in the property without the owner's consent until compensation shall be paid, it must follow that there can be no vested right in the compensation until after the amount is paid": *Chicago v. Barbican*, 80 Ill. 482; *City of Bloomington v. Miller*, 84 Id. 621; *St. Louis etc. v. Teters*, 68 Id. 144. "The right of way over the land does not pass until the damages, as finally ascertained, are paid in money or secured by a deposit in money": *Blackshire v. Atchison, Topeka, & S. F. R. R. Co.*, 13 Kan. 514; *State v. Cincinnati and Indiana R. R. Co.*, 17 Ohio St. 103. "The dedication of private property to public use is not complete until the proprietor is paid or tendered the value of his property, as ascertained by the inquest or assessment. No preliminary step prior to actual payment or tender so fixes the corporation as to prevent an abandonment of the condemnation or of the enterprise": *State v. Graves*, 19 Md. 351-370; *Graff v. Mayor etc. of Baltimore*, 10 Id. 544.

CLAIMANT CANNOT RESORT TO EXPERIMENTAL ASSESSMENTS. — In a recent Missouri case it is said: "Our supreme court has decided that the state, or any corporation to which it may delegate the right of eminent domain, may, before the consummation of proceedings to condemn private property for public use, abandon the enterprise in aid of which the condemnation is sought. In such case, however, the party exercising, by delegation, the tremendous power known as the right of eminent domain, must act in good faith. The exercise of this right can only be justified on the ground of the necessity of the particular property for the public use. To allow the state, or any deputy of the state, to pronounce a particular piece of property necessary or unnecessary, according to the terms on which it may be possible to acquire it; to enable the state or any corporation to be the sole judge of the due correspondence between the property and its variously estimated value; to cause a thousand estimates to be made, and to have the unrestricted right of rejecting, *toties quoties*, every estimate which did not suit its views, — would be thought an extravagant idea of arbitrary power if it were imagined in a satire. If the purpose of making the proposed public work be abandoned, the finding of its value by the jury is ineffectual, and all that remains to be done is to compensate the property owner for the damage inflicted on him by the inquest. But if the purpose, instead of being abandoned in good faith, is merely modified, — to ensure the party exercising the right of eminent domain to take the chances of a verdict of another jury, the first proceedings are a flat bar to such a course; and this for the sufficient reason that any other rule would work monstrous oppression and spoliation": *Rogers v. City of St. Charles*, 3 Mo. App. 41-46. Similar doctrine is asserted in *Neal v. Pittsburgh etc. R. R. Co.*, 31 Pa. St. 19; *Stafford v. Mayor etc. of Albany*, 7 Johns. 541. But the company may, after the assessment has been made, discontinue because of its being too high, and try another route, being in each instance liable for all the costs which their change of mind has occasioned; and this liability for costs is the only restraint upon them in this particular: *Gear v. Dubuque & S. R. R. Co.*, 20 Iowa, 523.

NOLIN v. BLACKWELL.

[2 VROOM, 170.]

SET-OFF MAY BE BARRED BY LIMITATION. The statute applies as well to a sum attempted to be set off as to one upon which an action is to be brought.

STATUTE OF LIMITATION — SET-OFF — ABSENCE FROM STATE. — Where the plaintiff resided out of the state when the claim constituting defendant's set-off accrued, and up to the time he commenced his action here, and the defendant became a resident of the state within six years after it accrued and continued to reside here until the action was commenced, that portion of the statute which provides that the time during which a person against whom a claim is due shall not reside in the state shall not be included in the period of limitation, saves defendant's set-off from the bar of the statute.

The opinion states the case.

Van Fleet and Vansyckle, for the plaintiff.

Richey, for the defendant.

By Court, ELMER, J. To an action of debt brought on a judgment rendered in the district court of the United States for the territory of Iowa, in the year 1840, the defendant pleaded payment, and gave notice of a set-off for a book-account which accrued prior to the year 1839, when both parties resided in Iowa. This claim did not appear to have been set off against the plaintiff's demand, for which his judgment was obtained. The defendant, who went from this state, left Iowa in 1839 and returned about the time the judgment was obtained against him, and has resided here ever since. The circuit judge having ruled that the set-off claimed was barred by our statute of limitations, the only question certified to this court for an advisory opinion is, Was this ruling correct?

The counsel who argued the case in this court maintained that the statute of limitations applies as well to a demand attempted to be set off as to one upon which an action is brought, and I think rightly. The eleventh section of our statute to enable mutual dealers to discount (Nixon's Dig. 790), copied substantially from an act passed in 1722, before there was any English statute authorizing a set-off, enacts that if any two or more having dealt together be indebted to each other upon bonds, etc., it shall be lawful to plead payment, and give notice of the set-off. This statute has for many years been considered and acted upon at the circuits as requiring the indebtedness set off to be of such a character as would entitle the defendant to have maintained an action upon it against the plaintiff, and of course, therefore, not a demand which, at the time the action was commenced, was barred by the statute of limitation. The object of the statute of set-offs, as was shown by the title of the original act, was to prevent multiplicity of lawsuits, and not to interfere with or affect the operation of the statute of limitations. To hold that a plaintiff who sued upon an assigned bond or an indorsed note, or upon any other independent claim, thereby deprives himself of the protection of that statute as a defense to any claim of the defendant, however stale, would certainly be inconvenient and unwise.

It is true that our statute of set-offs differs from the English statutes in three particulars, neither of which, however, does, in my opinion, affect its proper construction in this matter. It

provides that unless the defendant gives in evidence his set-off, he shall be precluded from bringing any action for it; it requires the set-off to be introduced in connection with the plea of payment, and it authorizes a judgment to be rendered in favor of the defendant, if the jury shall find, by their verdict, that he has overpaid the plaintiff. These provisions make the set-off operate as a payment or over-payment, when pleaded and so applied by the verdict, but do not, in my opinion, otherwise affect the condition of the claims, or change the law applicable to them. If the plaintiff sues on a bond, and the defendant claims as a set-off a debt due to him upon the plaintiff's bond, which turns out to be greater in amount than the plaintiff's debt, that part of the defendant's debt which, in the result, satisfies the plaintiff's debt, not that part of it which entitles him to a judgment for the overplus, can be considered as a payment in the legal meaning of that term; they ~~are~~ a payment or over-payment in their effect on the verdict and judgment.

The English statutes authorize a set-off where there are mutual dealings, and this expression has always been held to confine the set-off to a case where the dealing for which the defendant sets up a claim is one for which he could maintain an action not barred by the statute of limitations: *Remington v. Stevens*, 2 Strange, 1271; Bull. N. P. 180; *Chapple v. Durston*, 1 Crompt. & J. 1; *Walker v. Clements*, 15 Q. B. 1046. And the same principle has been adopted by the American courts: *Gilchrist v. Williams*, 3 A. K. Marsh. 235; *Turnbull v. Strohecker*, 4 McCord, 210.

In the case of *Smith v. Ruecastle*, 7 N. J. L. 357, decided in 1800, but not reported until 1824, Chief Justice Kinsey appears to have put the decision, which was clearly right, on the ground stated by the counsel, that the defendant's set-off, which was for a book-account more than six years old, had been acknowledged by the plaintiff within six years, on the principle that the statute made the set-off a payment; and also that, as there were demands on both sides, although wholly disconnected, the statute did not apply. This ruling has not been adopted by the courts in practice, and was in effect overruled by the cases of *Belles v. Belles*, 12 N. J. L. 339; *Gulick v. Turnpike Co.*, 14 Id. 545; and *Hibler v. Johnston*, 18 Id. 266.

That the defendant's claim, if he had brought his action for it, would have been barred by the first section of the statute of

limitations, is not disputed. The case therefore turns on the construction of the eighth section of that statute: Nixon's Dig. 469, sec. 14. Its language is: "If any person, against whom there shall be such cause of action as is specified in the first section, shall not be a resident in this state when such cause of action accrues, etc., then the time during which such person shall not reside in this state shall not be computed as part of the said limited period." If the plaintiff had come within this state, and the defendant had commenced an action against him for his claim, he would have come within the language of this section, for he was not a resident of this state when the cause of action accrued. It is however insisted, on behalf of the plaintiff, that he comes within the construction adopted in the cases of *Beardsley v. Southmayd*, 15 N. J. L. 171; *Taberrer v. Brentnall*, 18 Id. 262; *Howe v. Lawrence*, 21 Id. 751.

In all these cases the plaintiff was not only a non-resident when the action accrued, but he so remained during six years afterwards, and at the commencement of the action; while in this case the defendant, who, so far as his set-off is concerned, becomes virtually the plaintiff, was a resident of the state before his claim was barred by the statute, and has so continued ever since. The reason relied on by the judge who delivered the opinion of the court of errors in the case of *Howe v. Lawrence*, 21 N. J. L. 751, was the policy of not inviting foreign plaintiffs to make this state, which is the great thoroughfare of the country, an arena for the litigation of antiquated claims whenever the debtor can be brought within its jurisdiction.

This reason does not apply to this case, and in my opinion it will be the safest and best course to adhere to the plain language of the statute in all cases not falling within the precise ruling heretofore adopted.

I am therefore of opinion it should be certified to the circuit court that the set-off claimed by the defendant was not barred by the statute of limitations.

VAN DYKE, J., concurred.

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BARNES v. GIBBS.

[2 VROOM, 817.]

JUDGMENT OF SUPERIOR COURT OF ONE STATE, WHEN ACTION IS BROUGHT UPON IT IN ANOTHER STATE, will be in all respects of the same effect as a judgment of a court in the state where the action was brought.

ORIGINAL CAUSE OF ACTION IS MERGED IN JUDGMENT in an action brought upon it. The effect of a judgment at common law is practically to destroy, so long as it exists, the ground upon which it rests.

JUDGMENT IN ANOTHER STATE BARS SECOND ACTION UPON SAME CLAIM IN THIS STATE. Consequently, where plaintiff sued defendants in New York to recover a sum due him from them, and afterwards commenced another suit in New Jersey to recover upon the same claim, pending which latter suit a judgment was rendered in his favor in the New York court, this judgment bars his action in the New Jersey court.

AMENDMENT NOT ALLOWED. — Where plaintiff had two actions pending for the same debt, one in New York and one in New Jersey, and pending the latter suit a judgment in his favor is rendered in the New York suit, he will not be allowed to amend his pleadings from *assumpsit* on the claim to debt on the judgment.

On the twelfth day of July, 1864, plaintiffs sued defendants in the supreme court of New York upon a claim which they had against them. On the 20th of October, 1864, they commenced suit against defendants upon the same claim in the circuit court of Essex county, in New Jersey. January 24, 1865, judgment was rendered in favor of plaintiffs in the New York court, and defendants pleaded this judgment in bar of the action in the New Jersey court. Plaintiffs demur to this plea.

Parker and Keasbey, for the plaintiffs.

Taylor and McCarter, for the defendants.

By Court, BEASLEY, C. J. The principal question upon which this court is asked in this case for its advisory opinion is, whether the judgment rendered by the supreme court of New York occasions a merger of the original cause of action.

Mr. Justice Elmer, in the case of *Moulin v. Ins. Co.*, 24 N. J. L. 230, remarks, that "in *Mills v. Duryee*, 7 Cranch, 481, a majority of the judges seem to have understood that a judgment of a superior court of one of the states, when an action was brought upon it in another state, would be in all respects of the same effect as a judgment of a court in the state where the action was brought." That such will be the effect of a judgment rendered by a court having jurisdiction in the

premises, conferred by legislative authority upon principles consistent with international law, cannot now be considered an open question. Indeed, so completely does the discussion of this doctrine appear to me to be exhausted, and the doctrine itself to be so authoritatively established, that I do not deem it necessary to refer to the decisions pertaining to the topic, much less to review the ground on which these decisions rest. It is fit, however, to remark, that besides the expression of judicial opinion in this state above referred to, a similar view of this subject was evidently entertained by Chief Justice Ewing and the present chancellor: *Gulick v. Loder*, 18 N. J. L. 70; *Gilman v. Lewis*, 24 Id. 246.

If, then, the judgment of a state court, having a jurisdiction legitimately conferred upon it, has, in another state, the same effect, in all respects, which it would possess in the state in which the action was brought, it seems necessarily to result that, in the absence of all allegation of the existence of a different rule of law in the state where the judgment was rendered, the inference must be that the original cause of action is merged. The effect of a judgment at common law is practically to destroy, so long as it exists, the ground upon which it rests. This is one of its essential qualities, as much as is its capacity to conclude with regard to the fact which it adjudges. To deny it this efficacy is to deny that it is a judgment in any sense which will accord with legal principles. And in fact the doctrine of merger arises out of the quality of a judgment, which renders it conclusive upon the parties as to the questions which it involves. Theoretically, the original matter, which was open to controversy, is considered merged, because it is definitively settled by the judgment. Regarding, then, the judgment of the extraterritorial court as final, it is a necessary consequence to regard the original cause of action as merged, because if the plaintiff sue on the original cause of action, it is treating it, although judicially settled, as open to controversy. In addition to this, it may be remarked that the opposite doctrine would introduce confusion and uncertainty in the practical application of the principles of law which belong to the subject. To hold that the judgments rendered in other states are not, with regard to their effect, complete common-law judgments, would be to place the subject in an indefinite and mutilated condition. For if such judgment will not merge the original cause of action, who can tell what qualities are possessed by it?

Nor does there seem to be much weight in the argument, *ab inconvenienti*, which was pressed upon the attention of the court. It is true that meritorious creditors might sometimes find it to their advantage to pursue their debtors with simultaneous suits in two or more states. But even in such case it cannot escape observation that the course suggested as beneficial to the creditor savors something of harshness, if not oppression, to the debtor. Practically, he is vexed twice or oftener for the same cause. And on the other hand, when the claim sued on is unfounded and a just defense exists, the right to institute co-existent suits in different jurisdictions, founded in the same subject, becomes an instrument of oppression, which it would be by no means prudent to place within the reach of rapacity or vindictiveness. The maxims of common justice seem to require that the judgment should be considered as conclusive, both in favor of as well as against the debtor. But on this topic also, I think the adjudications already rendered have occupied the entire field of discussion: *Andrews v. Montgomery*, 19 Johns. 162; *Baxley v. Linah*, 16 Pa. St. 241 [55 Am. Dec. 494]; *Green v. Sarmiento*, 3 Wash. C. C. 17; *Bank of U. S. v. Merchants Bank*, 7 Gill, 415; *Bank of North Am. v. Wheeler*, 28 Conn. 433 [73 Am. Dec. 683].

The case certified calls for the opinion of this court on a second point, viz., whether, upon the assumption of a merger having taken place, the writ and pleadings in this case can be so amended as to transform the action from *assumpsit* to debt, and to permit the judgment obtained in New York to become the foundation of the suit.

Allowing the utmost amplitude to the power of this court to alter forms and correct errors, the present application seems to be much beyond the scope of such power. It is obvious the proposition is not to amend defects, but to substitute one cause of action for another. Besides, even if the court should permit the proposed commutation to be made, it would not avail the plaintiffs, because the ground of action sought to be substituted has arisen since the commencement of this suit. No record could be framed which would support a judgment exhibiting a cause of action accruing to the plaintiffs after the purchase of his writ. Such defect would be pleadable in abatement, or at the trial the plaintiffs could be nonsuited, or if it was disclosed in the declaration the defendants might demur, or move in arrest of judgment, or assign it for error: *Rhodes v. Gibbs*, 5 Esp. 163; *Hay v. Kitchen*, 1 Wils. 171;

Pugh v. Robinson, 1 Term Rep. 116; *Egles v. Vale*, Cro. Jac. 69; *Cheetham v. Lewis*, 3 Johns. 42.

In my opinion the circuit court should be advised that the plea demurred to should be sustained, and that the amendment proposed ought not to be allowed.

JUDGMENT OF STATE COURT HAS SAME CREDIT, validity, and effect in every other court in the United States which it had in the state where it was pronounced: *Cook v. Thornhill*, 65 Am. Dec. 63; *Bank of North America v. Wheeler*, 73 Id. 683; *Suydam v. Barber*, 75 Id. 254.

CAUSE OF ACTION BECOMES MERGED IN JUDGMENT recovered in an action brought upon it: *Bank of North America v. Wheeler*, 73 Am. Dec. 683; *Suydam v. Barber*, 75 Id. 254, and notes.

RECOVERY OF JUDGMENT IN ONE STATE IS BAR TO FURTHER PROSECUTION of the same cause of action by the same parties in another state: *Bank of North America v. Wheeler*, 73 Am. Dec. 683, and note. But an action is not abated by subsequent commencement and prosecution to judgment in the courts of a foreign nation of another action based on the same cause: *Wood v. Gamble*, 59 Id. 135.

HALL v. LEAMING.

[2 VROOM, 821.]

WHERE PLAINTIFF WHOSE JUDGMENT HAS BEEN PARTIALLY SATISFIED CAUSES EXECUTION TO ISSUE in a sum greater than the balance due thereon, and there is no proof that the wrongful act was willful or was done through malice, he will not be liable to an action on account thereof. CIVIL ACTION IS PROSECUTED ONLY AT PERIL OF COSTS. It is maintained as a claim of right, and to convert it into a suable tort, it must clearly appear that the legal process has been used from malice and without probable cause.

THE opinion states the case.

Parker and Keasbey, for the plaintiff.

Nixon, for the defendant.

By Court, BEASLEY, C. J. The facts proved in this case show that the defendant caused an execution to be issued on a judgment which he held against the plaintiff, for an amount which was in excess of what was really due. The sum ordered to be raised did not exceed the amount of the judgment, nor the amount originally due thereon, but it was for more than remained due after the subtraction of certain payments which had been made subsequently to the rendition of the judgment. There was no proof whatever that the wrongful act of the defendant was willful, or that in doing the same he

was actuated by malice, except so far as such circumstances are to be inferred from the nature of the act itself.

It does not seem to me that this action can rest upon any other ground than upon the theory that whenever a plaintiff puts the law in motion to the detriment of his adversary, and it eventually appears that he acted under a misapprehension of his rights, he renders himself liable to an action for an abuse of the process of the courts. The complaint here is, that the defendant issued his writ for a sum greater than the amount justly due him; and the argument is, that he must have known the real balance coming to him, and hence the inference follows that he proceeded as he did with consciousness of the wrong, and from improper motives. But it is obvious that, by parity of reasoning, if the defendant had sued for this same balance after a tender of the real amount due, and had failed to recover, a suit would have lain. This has never been pretended. For if the assertion of a claim, either by action or execution, and an adjudication that such claim is unfounded, are elements which of themselves constitute a legal cause of action, the consequence must be that want of success in a suit on the part of the actor is always actionable. This boundless field of litigation forms no part of the domain of the law.

I do not find that at any time there has been any obscurity or uncertainty as to the rule upon this subject. The counsel of the plaintiff produced no case which in the faintest degree appears to lend any color to this suit; but to the contrary, all the cases referred to show that something more is requisite to warrant a recovery than the facts proved on the trial of this case.

The leading if not all the authorities are in strict consonance, and all go to the point that a civil action in all its parts, being a claim of right, is pursued at the peril only of costs, if not sustained. This is the general rule within which this case strictly falls. To convert the act into a suable tort, it must clearly appear that the legal process has been used from malice, and without probable cause. These two ingredients are invariably held to be indispensable. In an early case, *Savil v. Roberts*, 1 Salk. 14, the doctrine is settled with much exactness. It is stated in these words: "So to bring an action, though there be no good ground, is not actionable, because it is a claim of right, and he has found pledges, and is amerceable *pro falso clamore*, and is liable to

costs; but if one has a cause of action to a small sum and take out a *latitat* to a very great sum, or has no cause of action at all, and yet maliciously sues the plaintiff to the intent to imprison him for want of bail, or do him some special prejudice, an action on the case lies." The modern decisions hold the same language, but I deem it superfluous to refer to them, as they will be found cited in the ordinary text-books. I will, however, quote the expression of this doctrine as contained in Broom's Treatise on the Common Law, Law Library, 3, N. S., p. 501, on account of the entire aptness of its application to the case now before the court. "Process of execution," says this accurate author, "on a judgment seeking to obtain satisfaction for the sum recovered, is, of course, *prima facie* lawful, and the judgment creditor cannot even be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partially satisfied, and that execution was sued out for a larger sum than remained due upon the judgment. Without malice and the want of reasonable or probable cause, the only remedy for a judgment debtor thus aggrieved is to apply to the court or a judge that he may be discharged, and that satisfaction may be entered upon payment of the balance justly due under the judgment. Where, however, the person of the debtor or his goods have been taken in execution for a larger sum than remained due on the judgment,—this having been done by the creditor maliciously and without reasonable or probable cause, i. e., the creditor well knowing that the sum for which the execution has been sued out is excessive, and his motive being to oppress and injure the debtor,—an action on the case will lie for the malicious injury."

This clear statement of the law is fully sustained by the cases referred to, and is, as it seems to me, a correct declaration of the legal principles controlling this subject as they have been always recognized and acted upon by the courts.

Let the circuit court be advised that the facts proved will not sustain the plaintiff's action.

ACTIONS FOR PROSECUTION OF CIVIL SUIT OR PROCESS: See *Potts v. Inlay*, 7 Am. Dec. 603; *Stone v. Swift*, 16 Id. 349; *Savage v. Brewer*, 28 Id. 255; *Turner v. Walker*, 22 Id. 329; *Plummer v. Dennett*, 20 Id. 316; *Whipple v. Fuller*, 29 Id. 330.

BOWLSBY v. SPEER.

[2 VROOM, 351.]

RAIN-WATER — THERE IS NO SUCH THING AS RIGHT TO ANY PARTICULAR FLOW OF SURFACE WATER JURE NATURÆ. — The owner of land may, at his pleasure, withhold the water flowing on his property from passing in its natural course onto that of his neighbor, and in the same manner may prevent the water falling on the land of the latter from coming on his own.

DIVERTING RAIN-WATER UPON LANDS OF PLAINTIFF. — Where the rain-water which fell upon the lands of defendant, and into and upon a certain pond above his place, fed exclusively by rain-water, was accustomed to flow through a kind of channel over defendant's land, and away from plaintiff's, and defendant erects a stable over this channel by which a part of this flow of surface water was diverted upon the lands of plaintiff, the injury is not actionable; it is *damnum absque injuria*.

ABOVE the land of plaintiff was situated the land of defendant, and farther up, on the hillside, was a pond fed exclusively by rain-water and melted snow. It was sometimes dry, and in times of heavy showers occasionally ran over. The rain-water which fell upon defendant's land, and the water which ran over from this pond, ran down a slight depression or channel over the lands of defendant, and away from those of plaintiff. Defendant, before the commencement of this suit, built a stable over this hollow, which interrupted the usual flow of this water, and caused it to flow upon plaintiff's land and into his cellar.

Gage, for the plaintiff.

Vanatta, for the defendant.

By Court, BEASLEY, C. J. It is not one of the legal rights appertaining to land that the water falling upon it from the clouds shall be discharged over land contiguous to it; and this is the law, no matter what the conformation of the face of the country may be, and altogether without reference to the fact that, in the natural condition of things, the surface water would escape in any given direction. The consequence is therefore that there is no such thing known to the law as a right to any particular flow of surface water *jure naturæ*. The owner of land may, at his pleasure, withhold the water falling on his property from passing in its natural course onto that of his neighbor, and in the same manner may prevent the water falling on the land of the latter from coming onto his own. In a word, neither the right to discharge nor to re-

ceive the surface water can have any legal existence except from a grant, express or implied. The wisdom of this doctrine will be apparent to all minds upon very little reflection. If the right to run in its natural channels was annexed to surface water as a legal incident, the difficulties would be infinite; indeed, unless the land should be left idle, it would be impossible to enforce the right in its rigor; for it is obvious every house that is built and every furrow that is made in a field is a disturbance of such right. If such a doctrine prevailed, every acclivity would be and remain a watershed, and most low ground become reservoirs. It is certain that any other doctrine but that which the law has adopted would be altogether impracticable.

This subject, until a comparatively recent date, does not appear to have received the attention of the courts. No ancient authority can therefore perhaps be produced, but the topic has of late been discussed both by the barons of the exchequer and by the courts of Massachusetts, and the doctrine placed upon a footing which, as it seems to me, should receive the assent of all persons. Upon an examination of these cases, it will be found that the conclusion is reached that no right of any kind can be claimed in the mere flow of surface water, and that neither its retention, diversion, repulsion, or altered transmission is an actionable injury, even though damage ensues. How far it may be necessary to modify this general proposition in cases in which, in a hilly region, from the natural formation of the surface of the ground, large quantities of water, in times of excessive rains, or from the melting of heavy snows, are forced to seek a channel through gorges or narrow valleys, will probably require consideration when the facts of the case shall present the question. It would seem that such anomalous cases might reasonably be regarded as forming exceptions to the general rule.

The legal principle as above stated is fully established in the following cases: *Greatrex v. Hayward*, 8 Ex. 291; *Rawstron v. Taylor*, 11 Id. 369; *Broadbent v. Ramsbotham*, 11 Id. 602; *Dickinson v. Worcester*, 7 Allen, 19; *Parks v. Newburyport*, 10 Gray, 28; *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Ashley v. Wolcott*, 11 Id. 192; *Shields v. Arndt*, 4 N. J. Eq. 234.

Upon the argument, the case of *Earl v. De Hart*, 12 N. J. Eq. 280 [72 Am. Dec. 395], was much relied on, and was, indeed, the only authority adduced with a view to controvert the rule of law as above propounded. But this decision, rightly con-

sidered, does not bear this aspect. The facts in that case proved a grant by implication, from lapse of time, the privilege to discharge the water in question in the manner claimed, and the general expressions used in the opinion of the court must be construed in accordance of the well-known rule, with reference to the circumstances to which they were applied, *secundum subjectam materiam*. The result in that case was obviously correct, but it was attained on grounds which, as they do not here exist, disenable it from being a guide in the determination of the present controversy.

Applying, then, the doctrine above indicated to the facts of the present case, the conclusion must be that upon the proof made at the trial the plaintiff was not entitled to recover. The water diverted by the building of the defendant was altogether surface water, and he therefore had a legal right to obstruct and to turn aside its course. If the plaintiff has suffered from such act, it is *damnum absque injuria*. Nor is her case helped by the circumstance that a portion of the water in question came from the pond, which was proved to exist, because no more waste water was discharged by reason of this reversion than there would have been if it had not been there. It was merely the rain-water flowing from the surface of the pond, as it would have done if the superficies had been land instead of water. Nor does it seem to me that there is any significance in the fact that there was an appreciable channel for this surface water over the land of the defendant, and into which it naturally ran. On every hillside numbers of such small conduits can be found, but it would be highly unreasonable to attach to them all the legal qualities of watercourses. I am not willing to adopt a doctrine which would be accompanied with so much mischief.

In my opinion the existence of a watercourse was not proved in the present case, and as this is the groundwork of the plaintiff's action, I think a new trial should be granted.

Rule made absolute.

SUPERIOR OWNER MAY IMPROVE HIS LANDS BY THROWING INCREASED WATERS UPON HIS INFERIOR, through the natural and customary channels, but the principle should be prudently applied; he has no right to dig new channels and cause increased flow of water through them upon his inferior's land; and the inferior is not obliged to receive on his land waters which nature never appointed to flow there, and may dam up a channel cut for the carrying of such waters to and upon his lands: *Kauffman v. Griesemer*, 67 Am. Dec. 437. Upper proprietor, in exercising servitude which he possesses

upon the lower estate, has no right to add thereto a body of water which, being left to its natural course, would not have found its way to the lower estate; nor can it be urged that the aggravation of the servitude is a benefit to the lower estate: *Barrow v. Landry*, 77 Id. 199. Right to have water flow off land through natural drain belongs to the owner of the land, without the acquisition of the easement by prescription, and he may lawfully remove an embankment erected by another which obstructs or cuts off such flow: *Overton v. Sawyer*, 62 Id. 170; see also *Earl v. De Hart*, 72 Id. 395; *Delahoussaye v. Judice*, 72 Id. 521. In the notes to these cases will be found references to valuable discussions of this question.

THE PRINCIPAL CASE IS CITED in *Town of Union v. Durkes*, 38 N. J. L. 21, where it was decided that a city is not liable to a suit for damages done by surface water running down in large quantities through a new street constructed over the crest of a hill, but that it would be liable if the street tapped a natural watercourse. It is also cited, and its doctrine followed, in *Taylor v. Fickas*, 64 Ind. 176.

NICHOLS v. DISSLER.

[2 VROOM, 461.]

TITLE OF BONA FIDE PURCHASER FOR VALUE UNDER JUDICIAL SALE, where the judgment and order for sale remain in full force and unsatisfied of record, cannot be defeated by parol proof of a payment of the debt by the defendant in execution to the plaintiff before the sale.

PAROL PROOF OF PAYMENT OF JUDGMENT. — At common law, in an action upon a record, the defendant could not plead payment, because such payment was matter *in pais*, and not of record. A defendant may settle a judgment debt with plaintiff upon such terms as they may agree to, and as between themselves this arrangement will be perfectly valid, but they cannot thus wipe out a record to the prejudice of other parties.

THE opinion states the case.

Tuttle and Carey, for the plaintiff.

Hopper and Zabriskie, for the defendant.

By Court, GREEN, Chancellor. On the trial of the cause in the court below, the defendant showed title to the premises in question under a deed from auditors in attachment, bearing date on the first day of July, 1841, and through sundry mesne conveyances to himself. The auditors' deed was made under a judgment in attachment, entered in the Passaic common pleas on the 6th of February, 1838, in favor of Farrand S. Stranahan v. Nichols, the plaintiff in this suit. The order for the sale of the land attached was made at July term, 1838. The judgment remained unsatisfied of record, and the order for sale unrevoked, and in full force at the time of the creditors' sale. To defeat the title thus established, the plaintiff

offered in evidence the record of a judgment recovered in the common pleas of the city of New York, by *Stranahan v. Nichols*, on the 25th of April, 1840, and a paper purporting to be a satisfaction piece of that judgment. He then offered parol evidence to show that the judgment recovered in New York was for the same debt with that recovered in New Jersey, and that the costs on the judgment in this state were paid before satisfaction was entered upon the judgment in New York. The evidence was overruled, and the judge instructed the jury that the evidence thus offered, to show that the judgment in attachment was inoperative and void, was incompetent for that purpose, and that they must consider the judgment, at the time of the sale by the auditors, as an existing unsatisfied judgment. To this charge the counsel of the plaintiff excepted, on the ground that the evidence offered was lawful and sufficient to establish the fact that at and before the time of the auditors' sale the judgment under which they sold was satisfied, and from the time of such satisfaction the judgment and all proceedings under the same were wholly inoperative and void.

The question is thus distinctly presented, whether the title of a *bona fide* purchaser for value, under a judicial sale, the judgment and order for sale remaining in full force and unsatisfied of record, can be defeated by parol proof of a payment of the debt by the defendant in execution to the plaintiff before the sale.

There is no intimation or suggestion of fraud in the procurement of the sale, either in the record before us, or by counsel at the trial, or upon the argument before this court.

At the common law parol evidence, even as between the parties to the judgment, was inadmissible to prove satisfaction of a judgment. The remedy of a defendant against whom a judgment had been rendered, and who had any good matter of discharge since the judgment, was by a writ of *audita querela*, which was in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. And the cases where this mode of relief was applicable, as stated by Blackstone, is where the plaintiff hath given a general release, or where the defendant hath paid the debt to the plaintiff without procuring satisfaction to be entered on the record: 3 Bla. Com. 405.

The form of this writ is disused. The modern practice is not to put the defendant to the expense and trouble of the writ of *audita querela*, but to grant relief upon summary mo-

tion. But the relief granted is the same. Satisfaction of the judgment will be entered upon motion, upon proof of the payment of the judgment.

So strict is the common-law rule against destroying the effect of a record by parol that in an action upon the record the defendant could not plead payment, because such payment was matter *in pais*, and not of record. As applied to parties and privies to the judgment, that rule has been altered by statute. But the common-law rule is unquestioned, and remains in full force as to all others than parties or privies.

At common law, where a judgment has been rendered, the defendant may discharge the debt by paying the debt to the sheriff before the return day of the execution; and the return of the officer, which he is bound to make, will show the fact of payment and the discharge of the debt.

So upon a writ of *fiери facias*, if the sheriff levy upon property of the defendant sufficient to satisfy the debt, the levy is itself satisfaction of the debt, although the sheriff should misappropriate or waste the property, unless, indeed, it should be restored to the defendant. In such case, the plaintiff must look to the sheriff for his satisfaction.

If the amount is neither levied upon the defendant's property nor paid to the sheriff, the defendant is at liberty to settle with the plaintiff upon such terms as he sees fit. It may be done by payment, by accord and satisfaction, or the plaintiff may forgive the debt and release it. As between themselves, such arrangement will be valid, but they cannot thus wipe out a record to the prejudice of other parties. In such case the parties, or either of them, may apply to the court and have satisfaction entered, and when that is done the record is discharged, and not before.

The statute of this state has made full and wise provision upon this subject for the protection of the defendant: Nixon's Dig. 407.

At the common law, the defendant, upon motion in court, may have satisfaction entered. The statute goes further. It authorizes the plaintiff or his attorney, as of his own motion, to enter satisfaction without the authority of the court. It prescribes the mode and form in which it shall be done, either personally or by power of attorney. It makes it the duty of the plaintiff, upon the request of the defendant, to enter satisfaction. The court will order it to be done at the defendant's request, and at the cost of the party who has received satisfac-

tion. And if either party is dead, the statute extends the same remedy to the survivors or their representatives.

Thus carefully and jealously did the common law guard the sanctity of a record and the rights of parties acquired under it, and thus carefully has our statute provided for the protection of all the just rights of the defendant.

But it is now claimed, and certainly for the first time successfully in this state, that the mere payment of the debt, or a release given by the plaintiff to the defendant, is *ipso facto* a satisfaction and discharge of the record, and an abrogation of the power of the court, although the judgment and the order for sale remain upon the record unsatisfied and in full force. And thus offer is made by the defendant in the execution to cancel the record by the verbal proof of himself and his attorney of a settlement between the parties in New York, and the satisfaction of a judgment more than nineteen years after the transaction occurred, for the defeat of the title of a *bona fide* purchaser for valuable consideration without notice, upon the faith of that record, more than nineteen years ago. In my judgment, the rules of law and the sound dictates of public policy alike forbid it.

There is no authority in this state to sustain the claim. Neither the case of *Simmons v. Vandegrift*, 1 N. J. Eq. 55, nor of *Den v. Downam*, 13 N. J. L. 135, properly considered, afford any support. The case of *Simmons v. Vandegrift*, *supra*, was a bill in equity by a purchaser under an execution for relief against a title fraudulently obtained under cover of a former judgment. The complainant (in the language of the chancellor) put himself before the court upon the broad ground that the judgments under which the sheriff sold were paid and satisfied, that this was known to the purchaser and sheriff, and that they effected the sale fraudulently to injure the complainant's title. And in reference to this state of facts, and to the claim made by the complainant, the language of the chancellor must be interpreted. It is undoubtedly true that if a prior judgment is satisfied, it cannot be used by the defendant as a cloak for fraud to defeat the claims of subsequent purchasers. And if a purchaser is a party to the fraud, and takes title with knowledge of it, he will not be relieved in equity.

In *Den v. Downam*, 13 N. J. L. 138, Judge Ford, in his charge to the jury, said: "To make payment an absolute discharge of an execution, it ought, in regularity, to be entered upon record, in satisfaction and discharge of the judgment.

It then operates as a discharge to all the world. It may, indeed, affect all parties and privies to a payment without being entered of record, but not strangers and innocent third persons, who purchase at public sales and pay the money *bona fide*." Upon a motion for new trial the verdict was sustained, although exception was taken to the charge. It was not, indeed, held that the charge in this particular was correct. The argument proceeded, and the case was decided upon other grounds. The case cannot be regarded as a direct authority in support of the principle contended for. In both these cases the payments were made, not to the plaintiff in execution, but to the sheriff himself, and in one of them the sheriff was charged as a party to the fraud.

They do not sustain the legal doctrine that a payment to the plaintiff is a satisfaction, which renders the judgment inoperative and void.

The doctrine is, that the judgment is technically satisfied by a payment to the plaintiff. The power of sale is extinguished, and the execution, it is said, is *functus officio*. That places sheriff, auditors in attachment, and all officers having the executions of writs in a remarkable dilemma. There was of record a judgment unsatisfied, and an order of the court that they should sell this land. If they refused to sell, they were punishable by fine and imprisonment; and if they made sale, their title is worthless.

If a sheriff, having a *ca. sa.* against the defendant, arrests him, and the defendant says, I have paid the debt; if he takes the defendant's word and discharges him, and it turns out that the debt is not paid,—the sheriff is guilty of an escape, and is liable for the debt. If he refuses to discharge him and the debt is paid, he is guilty of false imprisonment.

Or if the sheriff, under a *fi. fa.* and levy, is told that the debt is paid, he may be shown a receipt; the receipt may be a forgery. The sheriff is doubtless bound to give the defendant an opportunity to show payment and have satisfaction made. If he refuse to proceed, the court will amerce him in the whole amount of the debt and costs. If he does proceed, the defendant will sue him as a trespasser; and if he sells the real estate, the title will be worthless.

It is attempted to escape this dilemma by saying that the process may justify the officer, though it will pass no title to the land sold under it.

But how can an extinguished power justify any act done

under color of its authority? Voidable or irregular process may be relied on by way of justification. And if the judgment, though satisfied, can be regarded as operative, so far as to justify the officer, why may it not be equally operative to support the title of a *bona fide* purchaser without notice?

The judgment should be affirmed.

In this case, Mr. Justice Kennedy delivered a lengthy dissenting opinion. Upon the point upon which the judgment was affirmed, he said: "That a judgment on record, legally proved to be paid, is void, and any sale under it inoperative to the purchaser, or any subsequent purchasers, cannot well be denied. But a question has been raised by the counsel of the defendant, that a judgment on record cannot be proved to be paid by parol testimony; and the chief justice, in giving the opinion of the supreme court, sustains their objection.

"In this case, the evidence is conclusive as to the payment of the judgment, but the judge on the circuit, in accordance with the opinion of the chief justice, ruled that the evidence was not admissible, because it was parol testimony. I can see no validity in this objection, or in the opinion of the chief justice. I know of no law that precludes parol proof of payment of a debt in a court of justice, where the proof of payment comes up as part of the case. Parol testimony is always legal and proper in a court of law, unless in some particular case where statute law forbids it, which is not the case here. Parol testimony is one of the peculiar prerogatives of a court of law, and the clear and prescribed rights of parties in such cases.

"In *Jackson v. Caldwell*, 1 Cow. 622, Woodworth, J., says: 'It is certain that the judgment is no lien after payment, which is matter *in pais*, and may be established by parol testimony.' What is a judgment which is held a thing so sacred that either for payment or fraud it cannot be inquired into by parol testimony? It is a settled adjudication of an existing debt. It is also a power by means of which a creditor may enforce his claims by the sale of the debtor's property. The record is the evidence of the amount of debt and cost due. The power is the legal authority to sell. Both the record as evidence of debt, and the power to sell under it, are legally dead when payment is made. An existing debt is all the life a judgment ever had or can have. In this case, the plaintiff has actual and positive proof that the judgment and cost was paid nearly a year before the sale by the auditors. And when the defendant sought to claim title through the auditors' sale, it was competent for the plaintiff to produce parol testimony to prove that the judgment on which the auditors' sale was made was a paid judgment, and therefore void. But was the testimony offered entirely parol?

"It appears that after Stranahan had obtained judgment on his bond in the Passaic court he took the same bond and entered up another judgment in the common pleas of New York City. By this means he transferred his whole cause of action to another state. The two judgments on record in Passaic and New York were obtained on the same bond, and in effect, if not in law, were the same judgment. And when satisfaction in a legal manner was entered on the New York judgment by a satisfaction piece, and an exemplified copy of the same presented, it ought not to have been decided as mere parol testimony. The satisfaction entered legally in New York was a legal

satisfaction of both judgments. The chief justice in his opinion disposed of the case on the ground of 'the sanctity of judgments,' and also that public policy required courts to give protection to purchasers under a power in preference to all others. I have no idea of placing the sanctity of judgments above the sanctity of titles. Neither does public policy require that persons purchasing at their own risk under a power should be protected in preference to the original *bona fide* owners. *Caveat emptor* is a maxim of the law, and he who purchases at his own risk must take the risk. He must not expect courts to shield him from the consequences of his own voluntary act. But it may be said that the plaintiff in offering his testimony did not charge fraud, and that the charge does not appear in the record. It was not necessary for him to charge fraud. He had a right to offer any legal evidence to rebut the defendant's claim of title, and apply it afterwards. Plaintiff offered his rebutting testimony to prove that Stranahan, the plaintiff in the judgment, had first received the full amount of his judgment, and then directed his property to be sold in his absence on this paid judgment; and if the evidence had been given to the jury plaintiff might have successfully charged before the jury that the sale by Stranahan, the plaintiff in the judgment, for his own benefit, after the judgment was paid, and the purchase by his attorney, was fraudulent and void.

"The rule of law laid down by the chief justice not only protects paid judgments, but would also protect judgments obtained by fraud and perjury. Let me illustrate: Suppose a man living in New Jersey and owning land here. He pays his only creditor before witnesses, takes a receipt, and leaves for the West. In his absence his dishonest creditor, with his money in his pocket, procures an attachment for his paid claim by an affidavit that the amount is still due and unpaid. The attachment is advertised in a county paper which the absent man never sees, and in the usual course of legal proceedings the defendant's property is sold, and the purchaser takes possession. When the defendant returns, indignant at the wrong done him, he prosecutes the plaintiff in attachment in a criminal court, gets him indicted for perjury, and sends him to the state prison. He also brings an action of ejectment for the recovery of his lands. But the witnesses who were permitted to prove the perjury on which the judgment was obtained and the sale made, are rejected by the court below on account of the 'sanctity' of this fraudulent judgment, which cannot be attacked in a collateral way! Thus the criminal court furnishes the criminal, and the court of justice protects his crime and punishes his victim by withholding restitution.

"A rule of law which results in such gross injustice is certainly contrary to equity, and cannot be sound law; and I have not found a single decision but the one under review which favors it. It is said a contrary rule might injure the innocent purchaser. This may be true. But is the purchaser in the case I have cited in the case before us any more innocent than the original owner whose property has been fraudulently sold? And if two innocent men hold titles to the same property, the original owner by a *bona fide* sale, and the other by an auditor's sale under a fraudulent attachment, which innocent man should suffer? Surely not the original owner, who holds the oldest right. Most certainly the man who purchased at his own risk (innocently it may be) at a fraudulent sale. When a purchaser buys property at a private sale for his own use at a *bona fide* price, and when he does nothing to forfeit his title, he has the first claim upon courts of justice to protect him in his rights. And when, as in this case, an attempt is made in his absence,

by the wrong-doing of others, to wrest his property from him and transfer it to others, the first duty of courts is to stand by the original owner. There should be a remedy for every wrong, and I believe there is. But to make the wrong perpetual by a rule of law, shutting out the evidence to prove the wrong, would be a species of judicial legislation contrary to every principle of right and justice. Our constitution declares that 'no person shall be deprived of his property without due process of law.' The only legal proceedings to dispossess a land-owner is for debt, taxes, or by condemnation. If he is free from all these, then all proceedings, even if under the forms of law, are fictitious, and not due process." He closes his opinion by commenting upon *Wood v. Colvin*, 2 Hill, 566; *Craft v. Merrill*, 14 N. Y. 456; and *Simmons v. Vandegrift*, 1 N. J. Eq. 55.

SATISFACTION IS TECHNICAL TERM, and in its application to judgments, it means the payment of the money due by the judgment, which payment must be entered of record: *Planters' Bank v. Calcutt*, 41 Am. Dec. 616. For a case discussing what amounts to a satisfaction of a judgment, and the rights of a purchaser at an execution sale thereupon, see *Russell v. Hugunin*, 33 Id. 423. An execution issued upon a satisfied judgment is not void, but voidable, where the satisfaction has not been entered upon the record: *Boren v. McGhee*, 31 Id. 695.

At common law, debt on a judgment could not be barred by proof of a parol accord and satisfaction: *Mitchell v. Hawley*, 47 Am. Dec. 260.

ERIE RAILWAY COMPANY v. STATE.

[2 VROOM, 581.]

CONSTITUTIONAL LAW — STATE LAW REGULATING COMMERCE BETWEEN DIFFERENT STATES. — Act of the legislature of the state of New Jersey relating to corporations doing business in that state, not being corporations of that state, which provides that "every such company so doing business shall pay a transit duty of three cents on every passenger, and two cents on every ton of goods, wares, and merchandise, or other articles carried or transported by or for such company on any railroad or canal in this state for any distance exceeding ten miles, except passengers and freight transported exclusively within this state," is unconstitutional, because in conflict with that provision of the United States constitution giving Congress exclusive power to regulate commerce among the several states.

REGULATING INTERSTATE COMMERCE. — Imposing tax upon that portion of corporation's business relating exclusively to the transportation of goods in proportion to its volume, from one state to another, amounts to a tax upon the goods themselves. The right to place this duty on this business of the corporation is equivalent, considered as a prerogative of state government, to the right to tax the goods themselves.

REGULATION OF COMMERCE BETWEEN SEVERAL STATES. — Whenever the taxation of a commodity would amount to a regulation of commerce, so will the taxation of an inseparable incident or a necessary concomitant of such commodity. With regard to commerce between the several states, the transportation is as much a part of such commerce as the goods themselves.

STATE CANNOT TAX FOREIGN CORPORATION UPON DIFFERENT PRINCIPLE OR IN DIFFERENT MANNER from what she can tax one of her own domestic corporations.

FOREIGN CORPORATION IS RECOGNIZED IN FOREIGN JURISDICTION, NOT AS ACT OF RIGHT, but as an act of grace; and a state may refuse to recognize a foreign corporation except upon its own conditions.

ACT OF TAXING PROPERTY IS ACKNOWLEDGMENT OF LEGAL STATUS OF PERSON OR COMPANY upon whom the tax is levied. A state under a tax law cannot require a foreign corporation to pay any sum it may please, and then defend the act upon the plea that the company taxed has no rights but such as of grace may be conferred upon it.

THE opinion states the case.

Scudder, Depue, Shipman, and Eaton, for the plaintiff in error.

Frelinghuysen, attorney-general, for the defendant in error.

By Court, **BEASLEY, C. J.** The important question to be decided in this case arises out of the provision of the tenth section of the act of the legislature of this state relating to taxes, passed in the year 1862.

As much of the section as is thus drawn in question is in the words following, viz.: "That all corporations regularly doing business in this state, and not being corporations of this state, shall be assessed and taxed for and in respect of the business so by them done and transacted in this state, in manner following, that is to say: every such company so doing business shall pay a transit duty of three cents on every passenger, and two cents on every ton of goods, wares, and merchandise, or other articles carried or transported by or for such company on any railroad or canal in this state, for any distance exceeding ten miles, except passengers and freight transported exclusively within this state. And such transit duty for railroad or canal transportation shall be paid to the treasurer of this state within the month of January in each year for the transportation of the previous year; and it shall be the duty of the president or treasurer of every such company to furnish to the treasurer of the state, by or before the third Tuesday of January, annually, under oath or affirmation, a full and true account of the number of passengers, and of the number of tons of goods, wares, and merchandise, and other articles so carried or transported as aforesaid."

It is sufficient for all the purposes of the following discussion to state, generally, that the plaintiffs in error are a corporation created by the laws of New York, and that the business

which they habitually do in this state, and which is liable to the tax in dispute, is thus described in the state of the case agreed upon by the parties: "Most of the goods, wares, merchandise, and passengers, for the transportation of which by the Erie Railway Company, in the state of New Jersey, the said transit duty or tax is charged, have been, by that company and other railroads in connection with them, carried over the state of New Jersey from states and territories of the United States in the West to states of the United States in the East, and from states of the United States in the East, over New Jersey, to states and territories of the United States in the West. Some few goods, wares, and merchandise, and passengers have been transported from states and territories beyond the limits of the state of New Jersey, which transportation in New Jersey has exceeded ten miles."

From this statement of facts it appears that the plaintiffs are a foreign corporation, habitually transporting passengers and commodities, in the course of commerce between the states, over the territory of New Jersey, and that the tax in question falls on this business in proportion to the number of passengers and the weight of the commodities transported.

That the state of New Jersey, in the plenitude of her original sovereignty as an independent government, had the right to impose the tax on the business in question, no one can dispute. Did she relinquish such power in the formation of the general government? This inquiry obviously draws into the discussion that provision of the constitution of the United States which declares that Congress shall have power to regulate commerce with foreign nations and among the several states.

The precise question, then, to be considered and decided is, Has the tax which has given rise to this controversy been laid within the meaning of the prohibitory clause just referred to upon commerce between the states?

The principal argument urged before this court, in support of the negative of the foregoing proposition, was, that this law did not impose the duty on the goods, but on the business of the plaintiffs in error, and on this account was not within the constitutional prohibition.

It certainly is not to be denied that a state has the right to lay taxes which may incidentally affect commerce between the states. Indeed, it is perhaps impossible to imagine any tax which, in theory at least, may not be said to have in the

distance such effect. That this class of taxes is legal, upon both general and constitutional considerations, no one doubts. But the difficulty always has been, and it is probable ever will be, to determine with precision when any given tax which has a tendency to affect a subject having immunity, is within the purview of the constitution incidental and when direct. And this is the real difficulty now to be overcome by this court.

The first observation that naturally occurs is, that the tax imposed must, to avoid the taint of unconstitutionality, be indirect in substance, and not merely so in form. Can it be said that this is so in the present case? This tax falls on interstate commerce alone. It reaches no further. The burden is not on a general business, one branch of which is the transportation of extraterritorial goods. On the contrary, the only business of the plaintiffs in error which is not taxed is the business of such company done entirely in the state of New Jersey, and which does not consist of the transportation of merchandise from state to state. The law discriminates and selects the transportation of commodities passing from state to state as the peculiar objects of the duty. It is also laid upon an employment in which the citizens of the state imposing it have no concern; it can therefore be increased to any extent without in the least degree affecting their interests. This tax, consequently, cannot be said to fall incidentally on the prohibited subject on account of its being a general burden on multifarious matters, of which the conveyance of articles of traffic, in their passage from one state to another, happened to be one.

But this tax is not only thus specific, and restrained to this one class of objects, but it is also graduated by the weight of the things carried. The business is charged a certain sum for the transportation of every ton of goods. The tax therefore is regulated, both as to its object and amount, by the articles transported. Now, it is impossible not to perceive that the effect of such a tax must be, so far as respects the owner of such articles, precisely and in all its results the same as though the commodities themselves were directly taxed. The expense of the conveyance of such commodities from the place of production to the market is as much an element entering into their salable value as is the cost of their production. If a distinctive tax were placed upon all persons employed in manufactories, in proportion to the weight or value of the wares manufactured, no one would doubt that such tax would fall upon such wares, and would be ultimately paid by the con-

sumer. So when this tax is laid on the transportation of the merchandise, there is no more room for doubt that by the operation of well-known laws it must pass from the carrier to the things carried, and in the precise ratio of the statutory burden enhance their price in the market. The consumer must pay the custom, whether it be placed on the goods or upon their transportation. The result then is, that this imposition on the business of transportation, which it is argued is constitutional, produces the same effect, neither more nor less, upon the private business of the owner of the goods as would be produced by a direct tax on the goods themselves, which latter form of taxation would be undeniably unconstitutional. This substantial identity in the results would seem to favor strongly an inference of the substantial identity in the causes producing them. The conclusion from this course of reasoning therefore is, that if the transportation of merchandise, in *transitu* from state to state, can be taxed by a state in the form of the law now before this court, the constitutional provision under consideration affords no protection whatever to the owner of the goods which are the subjects of such transportation.

Nor does this matter, if we view it in its political effects, assume a more favorable aspect. The right to place this duty on this business of the plaintiffs in error would be equivalent, considered as a prerogative of state government, to the right to tax the commodities themselves. The political power and the political results would be in both cases identical. The exercise of the right to tax in either of these two modes would produce the same disorder in the general system of interstate commerce, and the same antagonism between the governments of the respective states. The origin of the constitutional restriction on the authority of the states, with regard to this species of taxation, is not involved in obscurity. It is known to all that it was the creature of a disastrous experience. The evils which are inseparable from the possession of the power by the several states to impose burdens on goods passing in the course of trade over their respective territories had been exhibited, during the existence of the Articles of Confederation, in results too portentous to be easily forgotten. "The interfering and unneighborly regulations of some states, contrary to the true spirit of the Union," says Mr. Hamilton in the *Federalist* (number 22), "have, in different instances, given just cause of umbrage and complaint to others; and it is to be feared that examples of this nature, if not restrained by a

national control, would be multiplied and extended till they became not less serious causes of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy. The commerce of the German empire is in continual trammels, from the multiplicity of duties which the several princes and states exact upon the merchandises passing through their territories; by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless. Though the genius of the people of this country might never permit this description to be strictly applicable to us, yet we may reasonably expect, from the gradual conflicts of state regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens." Such had been the scene of the past, and such was the anticipated future of this country, as drawn by the hand of a master, if each state were permitted to retain that right which belonged to sovereignty, of prescribing the terms on which the merchandise of other states might pass over her soil. And yet it would seem that all considerate persons must admit that the power now claimed will occasion, if exercised to any considerable extent, all those effects so much deprecated, and which, in our early career as a people, menaced so seriously the amity and unity of the Confederacy. If a state, whose geographical position is upon any of the great harbors along the seaboard, can, by right of its sovereignty, lay burdens on the business of transporting over its territory merchandise on its way to other states, must it not be universally conceded that the restriction in the constitution, now under review, is, considered as a political safeguard, fatally inefficient? It is to be remembered that this law attempts to raise revenue from the business of non-residents. The parties taxed are not the constituents of those who enact the law, and the consequence is, they do not possess any of that political influence which, under ordinary circumstances, is the sure means of protection against oppressive legislation. Can any one doubt that an example of this kind of irresponsible taxation will find a host of ready imitators? Or if the example should not be multiplied from imitation, would it not be inevitably reproduced for the purpose of retaliation? Perhaps it is not too much to say that a tax equal to the one now in question which should be imposed on the transportation of this same merchandise in each of the states through which it is carried

before it reaches our confines, would render the greater part of such merchandise unsalable at the place of its destination, except at a loss to its owner. We cannot suppose that any state would acquiesce in such a condition of affairs; it could not stand by and see its citizens thus despoiled, and its commerce in fetters. It would act, and then would ensue that petty conflict of rival interests which, at an epoch in the past already noticed, derogated from the character and endangered the peace of our country.

Nor would the evil consequences of this state prerogative which is now claimed stop even here. Thus far it has been seen that its effect would be to disturb the constitutional equilibrium of the states. But it would do more than this; it would affect in a very material point the relation of the states to the central government. By the fifth clause of the ninth section of article 1 of the constitution of the United States, it is provided that "no tax or duty shall be laid on articles exported from any state." This is a restriction on the power of the general government, and its obvious purpose was to guard against the application of the taxing power for the regulation of commerce in favor of one state, to the injury of the interests of another. None will deny that this cautionary provision is vastly important to each several state of this Union. But if the doctrine, that the taxation of the business of transportation is not, in legal effect, equivalent to the taxation of the merchandise so transported, is to prevail, what will be the worth of this circumscription of the federal authority? The general government has the same right as that possessed by each state to tax the business or occupations of individuals, and can therefore burden with tax, concurrently with the local governments, the employment of transportation. It would follow then, as an inevitable consequence, that if the law in question is sustainable, so would be a law of Congress placing a tax on the business of transporting through Pennsylvania all merchandise passing as exports through that state from New Jersey or elsewhere; and it needs no argument to demonstrate that a tax of this nature could be imposed in such form and under such conditions as to prevent anything like profitable exportation. Would any state thus disabled be satisfied with the argument that the tax was not upon the export, but was upon the business of transporting such export? It is believed that such a burden laid on the commerce of a state would be universally censured, not only as an act of injustice, but as a

palpable infringement of the constitutional provision just quoted; and yet, the imposition of such a burden would appear to be justified by the principle which alone can sustain the state law now in controversy.

The result of this reasoning is, that a recognition of the power claimed would not only affect disastrously the harmonious intercourse of the states with each other, but would also subject each of the several states to the liability of the exercise of a highly dangerous power on the part of the general government.

A construction which would thus frustrate the operation of the federal constitution in two respects, each of which is of great political importance, could not, in my opinion, be justified, except upon the ground that the language of the instrument is so clear upon the subject that it manifests that these results, so obvious and so hurtful, did not fall within the contemplation of the framers of the constitution, and consequently were not provided against. When an opposite result would be so injurious, it is a relief to conclude that such clear language, evincive of such oversight, does not exist. Interpreting the words of the constitution in the light of the evident purpose of those who employed them, it does not seem to me that the point in question is left in any obscurity. The object was to pass articles of traffic from one point in this country to another, through intervening states, free of impost or duty by such states. The goods, the transportation of which is taxed under the present law, are such articles; nor has it been denied that such goods, while being thus transported, constitute a part of the commerce between the states. But it seems to have been overlooked that the transportation is as much a part of such commerce as the goods themselves are. If there can be no commerce between the states without goods, so there can be none without the transportation of the goods. The two must be united to constitute interstate commerce. Is it not certain, then, that a duty on one of these two elements in commerce must, in the nature of things, operate as a tax upon the other? As commerce, the two things are indissoluble; are they divisible for the purpose of taxation? I think it may be laid down as a general rule, universally applicable to all cases arising under the clause of the constitution now considered, that whenever the taxation of a commodity would amount to a regulation of commerce, so will the taxation of an inseparable incident or a necessary

concomitant of such commodity. The object being to protect the merchandise from all exactions in its transit over a state by a rule of construction as necessary as it is elementary, we must imply a protection to the means requisite to effect such passage; because without such implication the privilege intended to be secured is defeated.

It was upon this doctrine that the case of *Brown v. Maryland*, 12 Wheat. 419, was decided. The facts were these: A state law required an importer to pay for and take out a license as a prerequisite to a right to sell imported goods,—and the court ruled that this requisition was in conflict with the provision of the constitution of the United States which prohibits a state from laying any impost or duty on exports or imports. The argument in support of the law was, that the tax was not on the articles imported, but that it was a tax on the privilege of the owner to sell the article after importation. It was said the state might lawfully tax occupations, and that this law did nothing more. But Chief Justice Marshall refuted the argument in the following clear and emphatic sentences: “It is impossible,” he says, “to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an imported article imported only for sale is a tax on the article itself. It is true that a state may tax occupations generally, but this tax must be paid by those who employ the individual, or it is a tax on his business. The lawyer, the physician, or the mechanic must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So a tax on the occupation of the importer is in like manner a tax on importation. It must add to the price of the article, and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself would be. This the state has not a right to do, because it is prohibited by the constitution.”

This reasoning, the strength and justness of which it is impossible to resist, appears to be entirely applicable to the case now before this court, for surely not more essential is the power to sell the imported article than is the power to transport the article to its market. In the reported case, the court also held that the tax upon the sale of the imported article

was likewise repugnant to the clause of the constitution which empowers Congress to regulate commerce among the several states, the argument being that commerce is intercourse, that importation and the right to sell the thing so imported were each an essential ingredient of such intercourse, and that consequently a restriction on the power to sell was, in the nature of things, a regulation of commerce.

The case of *Almy v. People of California*, 24 How. 169, rests upon analogous principles. The question was, whether a stamp duty on bills of lading for gold or silver transported to any part or place out of the state was a tax on exports. The court held the affirmative, and declared the act unconstitutional. Chief Justice Taney, in delivering the opinion of the court, thus expresses his views: "But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. . The necessities of commerce require it. A bill of lading therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article imported."

As a bill of lading is not, in any point of view, as necessary to an export as transportation is to an article of interstate commerce, it would seem self-evident, on the assumption of the correctness of this decision, that the taxation of such transportation must, of necessity, be a regulation of commerce within the prohibitory clause of the constitution. It is conceived that both these cases, so far as relates to the principle upon which the case now before this court is to be decided, are directly in point, — and as adjudications of the court of the last resort, of course their authority is decisive.

It has been already observed that the tax in hand is specific, that is, it affects but a single interest, viz., the transportation of goods in the course of traffic from one part of the country to the other. This singleness in the object taxed must necessarily, as it would seem, make the tax a regulation of commerce. No other doctrine is practicable, — because the right to tax in such form is an acknowledgment of the right to prohibit. Yielding the premises, the conclusion is unavoidable. The amount of the tax cannot affect its legality; if the

present duty, which it is presumed the business of the plaintiffs can easily bear, is legal, so, also, would be a duty under which such business must necessarily languish and die. In other words, the nature of this species of taxation is such that that a mere increase of sufficient magnitude of the duty in question would put an end to the business of interstate commerce, so far as the same is carried on by foreign corporations over the soil of this state. Nor is it perceived that there is anything in principle which would prevent an indefinite extension of such taxation. If the employment of these plaintiffs can be thus trammelled, why not impose the burden on the entire business of transporting merchandise from other states over the soil of this state? It is not forgotten that it was pressed by counsel on the argument in defense of this law that, as at present framed, it applies solely to the business of corporations created by the laws of other states. Viewed in a merely practical light, this consideration is not of much weight, for it is evident that almost all the commerce between the states must always be in the hands of corporations of this description, and that, consequently, the power to tax to the point of prohibition the business of such companies is substantially the power to interdict the entire commerce. But considering the question in a theoretical point of view, it would seem to be clear that a state cannot tax for the purpose of revenue a foreign corporation in a mode different in principle from that in which she can tax one of her own domestic corporations. It is not denied that the corporate existence of a company is recognized, not by right but of grace in foreign jurisdictions, nor that each government has the competence to refuse to recognize such existence except on its own conditions. The principle is universally acknowledged. Hence, laws requiring insurance companies and other foreign corporations to file bonds and submit to other exactions as a prerequisite to their admission in an incorporated capacity into the state. Such laws, when rightfully made, are evidently mere police regulations, designed to protect the citizens of the state in which they are enacted from loss or imposition, and on this ground their legality cannot be drawn in question. But a tax law, having revenue for its object, is based upon a principle entirely different. The right to tax for revenue is the right of the government to take so much of the property of the person or company upon whom the tax falls as such government may deem necessary for its public wants. The act of taking

the property therefore must, of necessity, be an acknowledgment of the legal *status* of the person or company whose property is taken. To assert that the company whose property is thus taken has no rights but such as the government taking it chooses to confer, is to assert that such company has no title to its property but such as may be conceded to it by the taxing power. It seems to be utterly inconsistent with legal principles, which have always been deemed axiomatic, to hold that a government can recognize the legal existence of a foreign corporation for the purpose of taxation, and at the same time can deny such legal existence for the purpose of depriving it of those rights which belong to every individual or company known to the law. Such a doctrine would obviously offer the entire property of foreign corporations as a prize to the rapacity of any state in whose territories it might be, or over which it might happen to be carried. It is readily to be admitted that a law imposing certain terms upon all foreign corporations as conditions precedent to their acquisition in this state of the right to act in the unity of their corporate existence would be legal. Such law would prevent foreign persons from doing any legal act in this state as a corporation, but can it be maintained that such law would have the further effect of leaving the property of the company as the spoil of the first taker? A statute that should abolish the rule of comity, and should refuse a recognition of foreign corporations, would, it is conceived, have this effect and no more, i. e., to convert the foreign corporators, as to the state enacting the supposed law, into a partnership of individuals; and thus, although the corporation as such could not, by suit or otherwise, assert its right to protect its property, the members of the company would be under no such disability. The opposite view would place the larger part of the property of corporations, in whose possession is accumulated so much of the wealth of the country, out of the protection of those fundamental principles of law, without the safeguard of which all property loses so much of its value. If a state under a tax law can require a foreign corporation to pay any sum it may please, and then may defend itself against the alleged unconstitutionality of such act on the plea that the company taxed has no rights but such as of grace may be conferred upon it, no reason is perceived why the general government could not at its pleasure seize the property of all corporations in this country, on the ground that incorporated companies have no

rights which the law is bound to respect, or which are recognized by the constitution of the United States. A principle involving such results is not admissible. The clause of the tax act in question, in my view, cannot be defended on the fact that the parties taxed are foreign corporations. The result therefore is, that if the present statute can be sustained, a law taxing the entire business of transporting interstate commerce would be constitutional,—the inevitable corollary to that proposition being, that as the power to tax transportation includes the power to destroy it, each state holds the right to permit or to refuse passage over its soil of goods carried in the course of trade from state to state. The statement of the proposition leaves my mind free from all doubt that the exercise by a state of a prerogative of this character, either so far as to burden such transportation or to prevent it altogether, is a regulation of commerce, which falls under the prohibition of the constitution of the United States.

Upon the argument before this court, it was rather suggested than insisted on, that the authority conferred by the constitution upon Congress to regulate commerce among the several states is not exclusive, but is concurrent with that of the states. The court, in illustration, were referred to the laws passed by the several states for the regulation of pilots and pilotage, and others of a like character, the constitutionality of which is not now at all questionable. But it is believed that since the decision of the case of *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299, this question, so far as it relates to a case similar to the one now before this court, is not open to discussion. Formerly, it must be confessed, the matter was perplexed to a great degree by much contrariety of opinion among the several members of the supreme court of the United States, but the decision referred to has placed the doctrine on more stable grounds. In that case it was resolved that although in matters of mere local interest, such as a system of rules controlling pilotage in harbors, the power of Congress was merely concurrent with that of the states; nevertheless, whatever subjects of the power to regulate commerce were in their nature national, or admitted of only one uniform plan of regulation, were of such a character as to require exclusive legislation by Congress. It is plain that this could not be affirmed of laws for the regulation of pilots and pilotage,—but is it not equally plain that it can be affirmed of the regulation now in question before this court? If the foregoing

argument has been successful, it has established the proposition that the tax created by the law of this state is a taxation of interstate commerce, and, certainly, admitting that postulate, all must concede that it is in its nature national, and not local.

The result, then, to which my examination of this subject has led me, is, that the legislature of this state had not the constitutional power to lay the tax in question on the business of the plaintiffs in error.

This conclusion has not been reached without the exercise of that degree of reflection which the importance of the subject so eminently demanded. Not the slightest doubt has been entertained that the law under review was enacted with the fairest intention, and that its purpose was simply to subject foreign corporations doing business in this state to an equitable share of the business of maintaining that government, which extended its protection to them as well as over the business of its own citizens. Nor has it been forgotten that it was one of the attributes of sovereignty, the taxing power of the state, which was to be passed upon. It is conceded that this prerogative is not only imperial in its character, but is absolutely necessary to the public welfare, and that a right, at once so elevated and so essential, is not to be diminished or impaired in the slightest degree, even on constitutional considerations, except on the surest grounds. But it is also to be remembered that even more valuable than the revenues of a state are those fundamental restrictions which prevent each member of this Confederacy from the exercise of those powers which, in the grand scheme of our national polity, have been prohibited. And being entirely satisfied, from the reasons above stated, that the legislative act now before this court, in imposing the tax in controversy, infringes one of these restrictions, it seems to me that, so far as its operation in this particular is concerned, it should, without hesitation, be declared by this court to be void.

In my opinion, the judgment of the supreme court should be reversed.

For reversal, BEASLEY, C. J., CLEMENTS, CORNELISON, ELMER, GREEN, Chancellors, KENNEDY, OGDEN, and WALES,—8.

For affirmance, none.

REGULATION OF INTERSTATE COMMERCE. — For cases involving the application of that provision of the federal constitution, giving to Congress the

exclusive power to regulate commerce between the states, see *Worsley v. New Orleans*, 41 Am. Dec. 333; *O'Conley v. City of Natches*, 40 Id. 87; *People v. Coleman*, 60 Id. 581; *Thames Bank v. Lovell*, 46 Id. 332; *Moor v. Veazie*, 52 Id. 655; *Thompson v. Steamboat Morton*, 59 Id. 658.

FOREIGN CORPORATIONS. — Right of individuals to be a corporation, and to act in corporate capacity, is a peculiar privilege, the creation of local law, and cannot by the mere force of that law exist or be exercised beyond the territorial limits of the state which enacts it. The right of a foreign corporation to exercise corporate powers is dependent upon the will of the state in which the exercise of such right is attempted, and is subject to be interdicted by it: *Commonwealth v. Milton*, 54 Am. Dec. 522. See also *Ohio L. I. & T. Co. v. Merchants' I. & T. Co.*, 53 Id. 742; *Blair v. Perpetual Ins. Co.*, 47 Id. 129.

THE PRINCIPAL CASE WAS DISTINGUISHED in *Rar. & Del. Bay R. R. Co. v. Del. & Rar. Canal etc. Co.*, 18 N. J. Eq. 546-555. The principal case is cited and distinguished in *Walcott v. People*, 17 Mich. 68, where it was decided that an act of the legislature requiring express companies to pay a specific tax of one per cent on the gross amount of current business within the state is not repugnant to that clause of the federal constitution which gives to Congress the power to regulate commerce among the several states.

STATE v. MAYOR ETC. OF JERSEY CITY.

[2 VROOM, 575.]

ACT OF LEGISLATURE AFFECTING CORPORATE CHARTER, GENERAL ACT REPEALING PROVISIONS THEREIN. — Where the charter of a railroad company, which the legislature reserved the right to alter or repeal, provides that they shall be taxed at the rate of one half of one per cent per annum on the amount of money expended by them, and that no other tax shall be levied upon them, and a subsequent legislature by a general tax law subjected to taxation the real estate of all private corporations "except those which by virtue of any irrepealable contract in their charter or other contract with the state," are expressly exempt from taxation, and where said act repealed all acts, whether special or local, inconsistent with its provisions, this last general law repeals the provision in the railroad charter, and subjects the property of the latter to the system of taxation therein provided for.

ACT OF LEGISLATURE NOT CONTRACT. — Act of legislature granting charter to railroad company, and providing therein that the company shall be taxed only in a certain sum and manner, and reserving a right to alter or repeal this charter, does not amount to a contract with the company. It lacks the essential elements of a contract, as there is no obligation on the state to continue the tax in the form prescribed. The distinguishing difference between an ordinary legislative act and an act amounting to a contract, is the implied agreement arising from some provision in the act not to alter or recall the privilege granted.

THE opinion states the case.

Zabriskie, for the plaintiffs in error.

McClelland, for the defendants in error.

By Court, BEASLEY, C. J. In the year 1862 the city, county, and state tax was assessed, by the assessor of Jersey City, on the capital stock of the Jersey City and Bergen Railroad Company, the plaintiffs in error in this court. The capital stock was estimated by this officer at one hundred and fifty thousand dollars, but it having appeared to the supreme court, from the proofs before them, that the whole amount of the capital paid in was but sixty-three thousand two hundred dollars, the sum assessed was measurably reduced, and in this modified form, the assessment was adjudged to be legal. This judgment is brought into this court by the writ of error in this case.

The act incorporating the Jersey City and Bergen Railroad Company was passed on the 15th of March, 1859: Pamph. Laws, p. 411. The fourteenth section of this law contains a provision in the following words, viz.: "And as soon as the said railroad, or any part thereof, shall be put in operation, the said corporation shall pay to the treasurer of this state a tax of one half of one per centum on the amount expended by said company for said road, which shall in like manner be paid annually thereafter on the first Monday in January in each year, provided that no other tax or impost shall be levied or assessed upon the said company." The last clause of this same statute declares "that the legislature may, at any time, alter, modify, or repeal the same."

Provisions similar to the foregoing are to be found in the charters of most of the railroads of this state, and it has been, on several occasions, decided that such provisions protect the companies from taxation imposed by force of general statutes: *State v. Minturn*, 23 N. J. L. 529; *State v. Bentley*, 23 Id. 532.

It was not denied, upon the argument, that the legislature has the power to alter, at will, the mode and amount of the tax prescribed in the charter of the plaintiffs in error, but the counsel of that company insisted that the legislature, by the act of 1862 (Pamph. Laws, p. 349), did not intend to make any such alteration. This point depends on the proper construction of sections 8 and 21 of the act last referred to. The former of these sections provides, "that all private corporations of this state, except those which, by virtue of any irrepealable contract in their charter, or other contracts with this state, are expressly exempted from taxation, shall be and are hereby required to be respectively assessed and taxed at the full amount of their capital stock paid in and accumulated

surplus." And the latter of the sections referred to declares, "that all other acts and parts of acts, whether special, local, or otherwise, inconsistent with the provisions of this act, be and the same are hereby repealed."

The first question arising on these clauses is, whether the plaintiffs in error are embraced in either of the classes constituting the exception to the general description of "all private corporations of this state."

It is not urged that the plaintiffs are excepted on the ground of being possessed of "any irrepealable contract in their charter," but their immunity is claimed because they belong to that other class of corporations who hold "other contracts with the state."

This same question was considered and decided by this court at the last term, in the case of *Miller ads. State*, 31 N. J. L. 521. That controversy grew out of an assessment which had been made by the assessor of the township of Morris, on certain land of the Morris and Essex Railroad Company, whose charter contained a provision similar to the one above quoted from that of the plaintiffs in this case, designating what sum the corporation should annually pay, and directing that such sum should be in lieu of all other taxes. As it was incontestable that if that company was possessed of a contract exempting it from all taxation within the meaning of the act of 1862, the assessment on their land was unlawful, the principal point discussed on the argument, and the one most carefully considered by this court, was the true construction of the eighth section of that act. It was altogether impossible to determine that case on rational grounds without settling, in the first place, and as the indispensable premises from which the conclusion of the court was to be drawn, the true meaning of this section. It will be seen, therefore, that the principal point, argued so ably by the counsel of the plaintiffs in this case, was the same point which formed a necessary part of the case alluded to, and which was then determined by a large majority of this court against the right of the company to the exemption claimed. On that occasion it was understood that the court adopted the reasoning and the conclusion on all the points contained in the opinion of Mr. Justice Elmer, delivered in the same case in the supreme court, the result being that the assessment which had been made on the land of the Morris and Essex Railroad Company was sustained, on the ground that the clause in the charter of that company did not

bring it within the exception declared in the eighth section of the act of 1862. In the opinion just mentioned the reasons of determination are so very clearly stated that it is not necessary, in order to explain what is believed to have been the views of this court, to do more than to refer to it. But there was an additional aspect in which this subject was presented to my own mind, and as it had much influence in leading to the judgment which I formed, it seems proper that it should be declared. It was this:—

It has appeared that the eighth section of the act of 1862 erected a new standard of taxation for all corporations, "except those which, by virtue of any irrepealable contract in their charters, or other contract with the state, are expressly exempted from taxation." The present plaintiffs claim, as was in the former argument claimed for the Morris and Essex Railroad Company, that although they have no irrepealable contract in their charter, still they have a contract with the state, which brings them within the excepting clause. The contract which they set up is the proviso in the fourteenth section of their charter, before cited, and which, following the provision fixing the annual sum they are to pay, declares that "no other tax or impost shall be levied or assessed" upon them. This designation of what they are to pay, connected with this proviso excluding all other burdens in the form of taxation, they contend forms a contract between them and the state. This, I think, is an error. These statutory provisions form, in my opinion, a contract neither in letter nor in spirit. They are to be read in connection with that other provision in this charter which reserves to the legislature the right to alter, modify, or repeal it. Taking the three provisions together then, we have: 1. A prescription on the part of the legislature of the amount which the company shall be required to pay annually; 2. A declaration that they shall be required to pay no other tax; and 3. A further declaration that the legislature reserves the right to alter this arrangement at its will. Now, it seems impossible to adduce from these three provisions a contract on the part of the state to exempt this company from taxation. If the legislature were to declare that each unmarried man should be subject to a poll tax of twenty dollars, "provided that no other tax or impost should be levied or assessed upon" him, no one would suppose that a contract thereby supervened. All persons would perceive that the essential element of a contract was wanting, that is, all obligation on the part of the

state to continue the tax in the form prescribed. So, in like manner, the arrangement of the mode of taxation in the charter of the plaintiffs lacks the very substance of a contract, as the whole scheme is alterable at pleasure. It is to be remembered that these legislative grants to corporations are seldom, if ever, in the form of contracts, but, on the contrary, the contract is wholly implied from the subject of the grant and the considerations in which it is founded. This was done in the Dartmouth College case, and as well in the few cases which preceded, as in the numerous ones which have followed, that celebrated decision. And it is also to be noticed that the entire contract on the part of the state, implied in each one of this line of cases, was the supposed legislative agreement not to alter or recall the privileges granted. No other stipulation on the part of the state was ever suggested to exist, and it was the imagined existence of such stipulation alone which converted what else, in all its essential qualities, as well as in its form, was an act of legislation, into a contract on the part of the community with the corporators. Without some such stipulation, having an obligatory force, I am wholly unable to conceive the ground of difference between the charter of a corporation and any other act of legislation. If a statute lay no obligation on the state to do, or to refrain from doing, a particular thing, or one or more things, such enactment seems to me to be a pure act of legislation, and in no sense a contract. I am not aware that any court has ever treated a charter of an incorporated company which was alterable and repealable at the legislative will as a contract on the part of the public. If from such a subject, with such incidents, a contract arises between the people and the members of the company, of what does such contract of the people consist? In the case now in hand, what did the state, either by expression or implication, agree to bind herself to do? I can see nothing in this law which, so far as concerns the state, bears a contractual impress. When a state grants lands to an incorporated company, or to an individual, it is obvious that there is, from the nature of the transaction, a tacit intimation on her part that she will not reassert any right over the thing relinquished, and on this basis is erected the structure of the implied contract. But it would be a useless refinement to raise up, by intendment, a contract where neither restraint is imposed nor the duty to perform an act assumed. In the case of *Fletcher v. Peck*, 6 Cranch, 87, the supreme court of the United States thus ex-

pounded the word "contract," as used in that clause of the constitution of the United States which forbids their impairment by legislation: "A contract is a compact between two or more persons, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. A contract executed, as well as one that is executory, contains obligations binding on the parties. A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right." This language, as accurate as it is unambiguous, was used in reference to a grant of land by the governor of a state under a legislative act. Here the essence of the contract, even when executed in the form of a grant of land, is derived from the national agreement of the state to refrain from reclaiming the thing granted.

But whatever aspect this general subject may be supposed to wear, and even though a revocable grant of things or franchises may be thought, in some of its features, to resemble a contract, still I am unable to see how that branch of the topic, which touches the question now before this court, is open to any doubt. For if we assume that a contract exists between the state and the plaintiffs in error, by force of their charter, yet, nevertheless, it would seem to be clear that it is not a contract of the character required by the excepting clause of the eighth section of the act of 1862. That contract is one by which the corporation, in the words of the act, is exempted from taxation. That is, from all kinds of taxation; taxation by virtue of special as well as general legislation. But the plaintiffs in error do not, and they certainly cannot, pretend that they have this broad immunity. If they can set up a contract at all, it must be to the effect that the state agreed to exempt them from all taxes which should not be specially imposed upon them. Immunity to this extent was claimed, and the claim conceded, in the case of *State v. Minturn*, 23 N. J. L. 529. But this will not bring them within the exception. The statutory requirement is exemption from taxation in all its forms; consequently, it is not enough to show an exemption in certain particulars. "Exempted from taxation" cannot be curtailed into "exempted from taxation under general laws imposing taxes," and this latter privilege is all that has ever been asserted under provisions in all respects identical with

the one under consideration. Regarding, therefore, this clause of the charter now in question either as an ordinary act of legislation or as a contract, I think the deduction is unavoidable, that the company is not possessed of that qualification which will protect it from the act of 1862.

On the argument of the present case, it was admitted that in *Miller ads. State*, 81 N. J. L. 521, it was held by this court that the repealing clause of the statute just referred to applied to the charters of all private corporations which did not comprehend a provision placing them within the excepting clause which has been the subject of the foregoing comments. It is not necessary, therefore, to allude to that point further than to refer to the opinion delivered in that case in the supreme court, and which has been already mentioned.

The only remaining ground taken against the present assessment was, that it appears from the evidence that the principal office of the company was not in Jersey City.

I have come to the opposite conclusion; the proof, as it appears to me, being clear upon the point.

In my opinion, the judgment of the supreme court should be affirmed.

For affirmance, BEASLEY, C. J., CLEMENTS, FORT, HAINES, VREDENBURGH, and WALES,—6.

For reversal, KENNEDY,—1.

THIS case is identical in principle with *State v. Miller*, ante, p. 122.

CASES
IN THE
COURT OF CHANCERY
OF
NEW JERSEY.

CONOVER v. SMITH.

[2 C. E. GREEN, 51.]

LESSEE WHO MAKES PERMANENT IMPROVEMENTS upon the demised premises, under a covenant that he shall be repaid their appraised value at the expiration of the term, may seek relief in equity as well as at law. The value of the improvements constitutes an equitable lien upon the premises, which alone entitles the party to relief in equity.

UPON COVENANT WHICH RUNS WITH LAND an action lies for or against the assignee at common law, though he is not named in the covenant. But it is otherwise if the covenant concerns something not *in esse* at the time, but to be built after the demise is made.

WHERE LESSEE COVENANTS FOR HIMSELF AND HIS ASSIGNS to make a new wall upon a part of the thing demised, it shall bind the assignee. But if the thing to be done is collateral to the land, and does not touch or concern the thing demised, then the assignee is not charged, though named in the covenant. The covenant is merely personal, and does not affect the land demised.

TO MAKE DEFENDANT LIABLE ON COVENANT there must be privity between him and plaintiff. The covenant must respect the thing granted or demised.

WHERE LESSOR COVENANTS WITH LESSEE, without mentioning his assigns, to pay the value of machinery and fixtures at the end of the term, which machinery and fixtures are authorized to be substituted for those upon the premises at the time of the demise, such covenant inures to the benefit of the assignee of the tenant, though he is not expressly named in the lease. But as such improvements constitute an equitable lien upon the premises, it can only be enforced in a court of equity.

BILL to recover the value of improvements erected by the lessee during the term of the lease. The opinion states the facts.

Parker, for the complainants.

Adrain, for the defendants.

By Court, GREEN, Chancellor. It is objected that there is no equity in the complainants' bill to entitle them to the relief prayed for. It is not denied that a lessee, having made permanent improvements upon the demised premises, under a covenant that he shall be repaid their appraised value at the expiration of the term, may seek relief in equity as well as at law. It is clear that he may: *Copper v. Wells*, 1 N. J. Eq. 10; *Berry v. Van Winkle*, 2 Id. 269. The value of the improvements constitutes an equitable lien upon the premises, which alone entitles the party to relief in equity. Other grounds of equitable relief may supervene. An appraisement pursuant to the terms of the covenant may have been rendered impracticable, or, as in this case, there may be conflicting questions of law and equity touching the rights and interests of lessors and lessees, their assignees or creditors, which renders relief at law inadequate or ineffectual.

But the objection is, that though the lessee be entitled to relief, yet under the terms of the lease in this case the assignee can maintain no action either at law or in equity for the value of the improvements. The lease itself is in the usual form to the lessees, their executors, administrators, and assigns. But the permission to remove the machinery then upon the premises, and substitute other machinery and fixtures, is given to the lessees without mentioning their assigns. And so the covenant to pay the value of the machinery and fixtures at the end of the term is in terms a mutual agreement between the parties to the lease and in favor of the legal representatives of the lessees, but not of their assigns.

Upon a covenant which runs with the land an action lies for or against the assignee at the common law, although the assignees be not named in the covenant. It was resolved in *Spencer's Case*, 3 Coke, 16, when the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed, and appurtenant to the thing demised, and shall go with the land and bind the assignee, although he be not bound by express words. But when the covenant extends to a thing not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being; as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the

contract, and extends to the support of the thing demised, and therefore is *quodammodo* annexed, appurtenant to the houses, and shall bind the assignee, although he be not bound expressly by the covenant. But if the covenant concerns a thing not *in esse* at the time of the demise made, but to be built after, — as to build a house or wall, — this shall not bind the assignee, if not named, for the law will not annex the covenant to a thing which hath no being.

If the lessee covenant for him and his assigns that they will make a new wall upon a part of the thing demised, it shall bind the assignee. But if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, then the assignee shall not be charged, though he be named in the covenant. The covenant is a mere personal covenant, not affecting the land demised: *Spencer's Case*, 3 Coke, 16, res. 1, 2; 1 Smith's Lead. Cas. 22; *Lametti v. Anderson*, 6 Cow. 302; *Thompson v. Rose*, 8 Id. 266; *Tallman v. Coffin*, 4 N. Y. 134; Taylor's Landlord and Tenant, sec. 260.

In *Bally v. Wells*, 8 Wils. 25, after a statement of the resolutions in *Spencer's Case*, *supra*, the principle is thus stated by the court: "There must always be a privity between the plaintiff and defendant to make the defendant liable to an action of covenant. The covenant must respect the thing granted or demised. When the thing to be done or omitted to be done concerns the lands or estate, that is the medium which creates the privity between the plaintiff and defendant. As if lessee for life covenants for him, his executors and administrators, to build a wall within his term, and afterwards he assigns over his estate, the grantee of the reversion shall have covenant against the assignees, and notwithstanding the covenant wants the word 'assigns.' Yet every assignee, by accepting the possession, hath made himself subject to all covenants concerning the land, but not to collateral covenants; and covenants of repairs and building walls or houses are covenants inherent to the land, with which the assignee, without the special words, shall be charged."

This is a very clear and intelligible statement of the legal principle, and varies from the resolutions in *Spencer's Case*, 3 Coke, 16, in this, that it makes no distinction in the effect of the covenant whether it relate to the repairs of an existing building or to the erection of a new one, provided it be upon the demised premises, the land or estate being the medium

which creates the privity between the plaintiff and defendant. So that the assignee of the lessee is bound by the covenant, whether it relate to the erection of a new building or the repairs of an old one. It is worthy of notice that the opinion of the court, both in the statement of the resolution in *Spencer's Case*, 3 Coke, 16, and in the subsequent enunciation of the principle growing out of it, disregards the distinction between the erection and repairs of a building. And the opinion is entitled to the more consideration as it emanates from a court over which Chief Justice Wilmot presided, and is preserved in a volume of reports which is justly characterized as a very accurate repository of judicial decisions.

If this be a true statement of the principle, the covenant of the lessor in this case to pay for the improvements clearly inures to the benefit of the assignee. For if the assignee was authorized or bound by the terms of the covenant to change the machinery, the covenant to pay for it must inure to his benefit. But, adopting the statement of the principle as contained in *Spencer's Case*, 3 Coke, 16, to be the true one, the question still remains, Is not the covenant in this case within the principle extending the operation of the covenant to the assignee, though not named? The covenant respects not the erection of new buildings, but alterations and improvements in existing buildings; a change of one set of machinery and fixtures for another in the buildings demised. In the language of the resolution in *Spencer's Case*, *supra*, it extends to the support of the thing demised, and therefore is *quodammodo* annexed, appurtenant to the buildings.

If it be objected that the machinery to be paid for is new and formed no part of the demised premises at the time of the demise, it may be answered that the materials and labor which constitute the repairs formed no part of the demised premises at the time of the demise, but that the covenant in the one case as well as in the other concerns the thing demised, and is not collateral to it.

It seems to me, therefore, that this covenant extends to the assignee, though he is not expressly named in the contract, and that an action at law as well as in equity may be maintained by the assignee to enforce it.

But if it be conceded that by the strict rules of the common law the covenant does not affect the assignee, and that no action at law could be maintained upon it in his name, it does not follow that he is without relief in equity. It is admitted

that the machinery and fixtures were not substituted by the lessees themselves, but by the assignees. The machinery in the mills at the time of the demise was removed, sold, and the price paid to the lessors, and the new machinery was substituted and improvements made as provided in the contract. The complainants are now before the court asking compensation for valuable improvements made upon the demised premises during the continuance of the term, with the knowledge and consent of the lessors. These improvements constitute an equitable lien upon the premises which can be enforced only in this court. It was upon this ground that relief was granted in the cases of *Copper v. Wells*, 1 N. J. Eq. 10, and *Berry v. Van Winkle*, 2 Id. 269, already referred to. The design of the complainants' bill is to enforce this lien, and to secure to the complainants the value of the substituted machinery and fixtures at the expiration of the term.

In this aspect of the case it does not seem to be material whether the assignees at the expiration of the lease unlawfully refused to surrender the premises, or whether they were then in a situation to transfer the property clear of encumbrance, or whether from this or any other cause the defendants were not bound to join in the appointment of arbitrators. If the complainants were asking the appointment of an arbitrator, with a view to the specific performance of the contract, a different question would be presented. It is clear that the court would not, under the circumstances, appoint an arbitrator, or enforce the specific performance of the contract: *Copper v. Wells*, 1 N. J. Eq. 14; *McKibbin v. Brown*, 14 Id. 13.

Whatever effect the unlawful refusal of the complainants to surrender possession, or their inability to transfer the substituted machinery to the defendants, may have upon their rights or interests, they constitute no obstacle to the complainants' suit, nor do they affect the equity of the bill.

The lessees are authorized by the terms of the contract to remove the machinery from the mills upon the premises at the date of the demise, and to substitute in the place thereof such other machinery and fixtures as might be necessary or proper for carrying on their contemplated business. Whether the brick building claimed to have been erected upon the premises is within the contract, or constitutes a matter for compensation, will depend upon the character of the building and the use to which it was applied; and this will form a proper subject of inquiry before the master.

IMPROVEMENTS, WHEN DAMAGES MAY BE RECOVERED FOR: *Findley v. Wilson*, 14 Am. Dec. 72.

COVENANT IN LEASE RELATING TO THING DEMISED runs with the land: *Laffan v. Naglee*, 70 Am. Dec. 678.

HINCHMAN v. PATERSON HORSE RAILROAD CO.

[2 C. E. GREEN, 75.]

PUBLIC NUISANCE MUST BE OCCASIONED BY ACTS done in violation of law.

A work authorized by law cannot be a nuisance.

WHETHER CONSTRUCTION OF RAILROAD IN CITY STREET would operate beneficially or injuriously to the public right of way, whether it would prove a public benefit or a public nuisance, are questions to be determined by the legislature and the city council. If they err in judgment, and the work prove an obstruction to the street and a public inconvenience and injury, it is not punishable as a nuisance if constructed as prescribed by the city charter.

EQUITY WILL NOT INTERFERE BY INJUNCTION in cases of unquestioned public nuisance, except where there is special and serious injury to the complainant distinct from that suffered by the public at large.

RAILROAD COMPANY AUTHORIZED TO ACQUIRE LANDS for the use of their road by condemnation, and required to make payment or tender of compensation to the owners before occupying the land, cannot construct their road across or upon a highway without making compensation to the owner of the soil so occupied.

OWNER OF SOIL UNDER HIGHWAY OCCUPIED BY RAILROAD COMPANY cannot be deprived of his property or prejudiced in any right therein without compensation, even by express authority of the legislature, under a constitution declaring that private property shall not be taken for public use without just compensation.

BUILDING AND OPERATION OF HORSE-RAILROAD in the streets of a city by authority of the legislature and the city council, under limitations and restrictions contained in the city charter, is a legitimate use of the highway and an exercise of the public right of travel, and not a taking of private property for a public use, within the provision of the constitution.

WHERE COMPLAINANT'S RIGHT IS DOUBTFUL, and no irreparable injury will be inflicted by the subject-matter complained of, it is not a proper case for an injunction.

PRESUMPTION IS THAT OWNERS OF LAND on each side of the street own to the middle of the street and have exclusive right to the soil, subject to the right of way.

INFERENCE OF LAW IS THAT CONVEYANCE OF LAND bounded on a public highway carries with it the fee to the center of the road as part and parcel of the grant.

BILL IS DEMURRABLE ON GROUND OF MISJOINDER of parties where the complainants are owners of several and distinct parcels of land, and have no common interest, but each seeks relief for special injury to his own property, under the impression that the nuisance complained of is a grievance

common to all of the land-owners, and therefore that all might be properly joined.

As GENERAL RULE, OBJECTION TO BILL on ground of misjoinder should be made by demurrer.

BILL to enjoin defendants from constructing a horse-railway through the streets of the city of Paterson under power contained in their act of incorporation. The complainants are owners of lots bordering upon certain streets in said city, and ask for the injunction for the reasons that the building of the road will obstruct the use of the streets, that it is a public nuisance and an injury to the value of their property, and that it is taken for a public use without just compensation.

Woodruff and Gilchrist, for the complainants.

Pennington and Zabriskie, for the defendants.

By Court, GREEN, Chancellor. A public nuisance must be occasioned by acts done in violation of law. A work which is authorized by law cannot be a nuisance: *King v. Pease*, 4 Barn. & Adol. 30; *Bordentown and S. Amboy Turnpike Co. v. Camden and Amboy R. R. Co.*, 17 N. J. L. 314; *Davis v. Mayor of New York*, 14 N. Y. 506 [67 Am. Dec. 186].

Whether the construction of a railroad in the street of a city would operate beneficially or injuriously to the public right of way, whether it would prove a public benefit or a public nuisance, are questions to be determined by the legislature and by the city council. If they err in judgment, and the work prove an obstruction to the street, and a public inconvenience and injury, it is not punishable as a nuisance, if constructed as prescribed by the charter.

The injury which the owners of lots upon the street suffer from obstructions in the street and impediments to traveling are common to all the public. In cases of unquestioned public nuisance, a court of equity will not interfere by injunction, except in cases of special and serious injury to the complainant, distinct from that suffered by the public at large: *Corning v. Lowerre*, 6 Johns. Ch. 439; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565 [36 Am. Dec. 502]; *Allen v. Board of Chosen Freeholders*, 13 N. J. Eq. 68; *Zabriskie v. Jersey City & B. Railroad Co.*, 13 Id. 314.

The real question in the cause is, whether the charter of the defendants, authorizing them to lay a railroad through the streets of the city over the land of the complainants, is a violation of that provision of the constitution which prohibits

the taking of private property for public use without just compensation.

I take it to be the settled law of this state that a railroad company authorized to acquire lands for the use of their road by condemnation, and required to make payment or tender of compensation to the owners before occupying the land, cannot construct their road across or upon a highway without making compensation to the owner of the soil occupied by the highway: *Starr v. Camden and Atlantic R. R. Co.*, 24 N. J. L. 592; *Central R. Co. v. Hetfield*, 29 Id. 206.

The principle is fully sustained by the cases of *Trustees of the Presbyterian Society v. Auburn and Rochester R. R. Co.*, 3 Hill, 557; *Williams v. N. Y. Central R. R. Co.*, 16 N. Y. 97 [69 Am. Dec. 651]; *Mahon v. N. Y. Central R. R. Co.*, 24 Id. 658; *Wager v. Troy Union R. R. Co.*, 25 Id. 526.

It would seem to follow as a necessary consequence, that the owner of the soil under the highway cannot be deprived of his property, or be prejudiced in any right therein, without compensation, even by express authority of the legislature, without a violation of the provision of the constitution which declares that private property shall not be taken for public use without just compensation. It was so held by Mr. Justice Haines, in the case of *Starr v. Camden and Atlantic R. R. Co.*, 24 N. J. L. 592, already referred to. He said: "The premises in question (viz., the land occupied by the highway), being private property, could not, either by the constitution or by the charter of the company, be taken without compensation." The opinion is fully sustained by the cases in New York already cited. In the case of *Trustees of the Presbyterian Society v. Auburn and Rochester R. R. Co.*, 3 Hill, 569, Chief Justice Nelson said: "It is quite clear that the legislature had no power to authorize the company to enter upon and appropriate the land in question for purposes other than those to which it had been originally dedicated, in pursuance of the highway act, without first providing a just compensation." And in *Williams v. New York Cent. R. R. Co.*, 16 N. Y. 111 [69 Am. Dec. 651], Judge Selden, delivering the opinion of the court, said: "The legislative provisions on the subject were probably intended to confer the right so far only as the public easement is concerned, leaving the companies to deal with the private rights of individuals in the ordinary mode. If, however, more was intended, the provisions are clearly in conflict with the constitution, and cannot be sustained."

The principle, as applied to ordinary railroad companies which are authorized to excavate the soil, to raise embankments, to construct tunnels, and to use locomotive power running at high rates of speed, seems clear of difficulty.

“The two uses, viz., that of railroad and ordinary highway, are almost, if not wholly, inconsistent with each other, so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated”: *Inhabitants of Springfield v. Connecticut River R. R. Co.*, 4 Cush. 63. This is especially true when the land taken is applied exclusively to the use of the railroad, as by tunneling under the highway for the railroad track.

But there is more difficulty in the application of the principle where a railroad track is permitted by the municipal authorities to be laid upon the surface of the streets, and to be used as a part of the highway, and in connection with it, as in case of street railroads. They are ordinarily, as in this case, required to be laid level with the surface of the street, in conformity with existing grades. No excavations or embankments to affect the land are authorized or permitted. The use of the road is nearly identical with that of the ordinary highway. The motive power is the same. The noise and jarring of the street by the cars is not greater, and ordinarily less, than that produced by omnibuses and other vehicles in ordinary use. Admit that the nature of the use as respects the traveling public is somewhat variant, How does it prejudice the land-holder? Is his property taken? Are his rights as a land-holder affected? Does it interfere with the use of his property any more than an ordinary highway?

Nothing is claimed in support of this view of the case, on the ground that city railroads are a great public convenience and benefit. If they are so, the public can afford to pay for it. That is certainly no reason why individual property should be taken for public use. But admit, as the counsel of the complainants claim, that a railroad constructed and managed as street railroads frequently are is a serious public inconvenience,—an obstruction to travel, and an injury to the interests of the city,—Does that affect the rights of the land-holder any more than if the streets are suffered to become obstructed from any other cause, owing to the neglect or incapacity of the municipal corporation? The question at last recurs, What is taken from the land-holder by a change in the use of the street, for which he is entitled to compensation? Neither his

title to the fee nor his right to the use or enjoyment of the land is interfered with. The railroad company acquire no estate or interest in the land itself, but the mere right to the use of the highway or public easement. This view was adopted by Chancellor Williamson in the case of *Morris and Essex R. R. Co. v. City of Newark*, 10 N. J. Eq. 358, and is sustained by many of the reported cases: *Williams v. N. Y. Cent. R. R. Co.*, 18 Barb. 222; *Case of Philadelphia and Trenton R. R. Co.*, 6 Whart. 25 [36 Am. Dec. 202]; *Commonwealth v. Erie and North E. R. R. Co.*, 27 Pa. St. 354 [67 Am. Dec. 471]; *Elliott v. Fair Haven R. R.*, 37 Conn. 579; *People v. Kerr*, 37 Barb. 357; *Brooklyn Central and Jamaica R. R. Co. v. Brooklyn City R. R. Co.*, 33 Id. 420; *Brooklyn City & N. R. R. Co. v. Coney Island & B. R. Co.*, 35 Id. 364.

After much conflict of opinion, a different rule seems to have been settled in the courts of the state of New York. In the recent cases in that state it is held, not only that the laying of a railroad upon a highway is a taking of private property and a burden upon it beyond the servitude of the easement of the highway, but that there is no distinction, so far as the constitutional question is concerned, between a horse-railroad in the streets of the city and a railroad with broader powers operating by steam: *Wager v. Troy Union R. R. Co.*, 25 N. Y. 533; *Craig v. Rochester City & B. R. R. Co.*, 39 Barb. 494.

I am nevertheless of opinion that the building and operation of a horse-railroad in the streets of a city, under the restrictions and limitations contained in the charter of the defendants, by authority of the legislature and of the city council, is a legitimate use of the highway and an exercise of the public right of travel, and not a taking of private property for public use within the provision of the constitution. If it be admitted that this is a matter of doubt, it is, nevertheless, in accordance with a previous decision of this court, which, so far as I am aware, has not been questioned by any judicial tribunal of the state. It is of great importance that the law, where such large interests are at stake, should not be unsettled by conflicting decisions in the same tribunal.

Where the complainants' right is doubtful, and no irreparable injury will be inflicted by the construction of the road, it is not a proper case for an injunction. If the complainants' view of the case be correct, they have adequate redress at law for all damages that may be sustained; or, their

rights being established, they may invoke the power of this court to restrain the use of the road.

The presumption of law is, that the owners of the land on each side of the street own to the middle of the street, and have the exclusive right to the soil, subject to the right of way. It is objected by the defendants' answer that the complainants' titles do not extend to the middle of the street, because the lots as described are bounded by the sides of the streets. But the established inference of law is, that a conveyance of land bounded on a public highway carries with it the fee to the center of the road as part and parcel of the grant: 3 Kent's Com. 432, 433; *Cooke v. Green*, 11 Price, 736; *Champlin v. Pendleton*, 13 Conn. 26; *Adams v. Saratoga & Wash. R. R. Co.*, 11 Barb. 414; *Buck v. Squiers*, 22 Vt. 484; Redfield on Railways, 159, note, and cases cited; *Bissell v. New York Cent. R. R. Co.*, 23 N. Y. 61 [82 Am. Dec. 369].

The bill is objectionable on the ground of a misjoinder of parties. The complainants are owners of several and distinct lots, having no common interest, but seeking to enforce several and distinct claims. They seek to enforce no common right as in cases of right of common, nor to obtain relief against a common wrong as in cases of fraud, where all the creditors are equally affected. The bill seems to have been framed under the impression that the nuisance was a grievance common to all the land-owners, and therefore that all might properly be joined. But each complainant seeks relief for special injury to his own property by the construction of the railroad. On this ground the bill is clearly demurrable: Story's Eq. Pl., secs. 279, 544.

Several occupiers of houses in town cannot sue as co-plaintiffs to restrain the erection of a steam-engine, which would be a nuisance to each of them: *Hudson v. Madison*, 12 Sim. 416; and on the ground of misjoinder, the injunction issued in this case was dissolved, as it was also by Lord Eldon, in *Jones v. Del Rio*, 1 Turn. & R. 297.

As a general rule, the objection on the ground of misjoinder should be made by demurrer. But this is a mere injunction bill, and if the injunction should be granted a demurrer would be fatal. No final decree could be pronounced in favor of the complainants, and nothing could be eventually gained in the present shape of the bill by sustaining the present application.

If this were the only objection it would not be suffered to

stand in the way of the order for an injunction. The defendants would be put to their demurrer, and an opportunity permitted to the complainants to present their claim in a form to avoid the technical difficulty. The decision is made solely upon the merits of the bill. It is desirable that the leading question in the cause should be disposed of, and if possible promptly settled, irrespective of all technical or collateral issues.

The motion for an injunction is denied, and the rule to show cause discharged, with costs.

ACTION LIES FOR PUBLIC NUISANCE by one damaged specially and beyond that sustained by public: *Crommelin v. Coxe*, 68 Am. Dec. 120, and note 126; *Norcross v. Thoms*, 81 Id. 588, and note 591.

WHERE HIGHWAY IS TAKEN FOR RAILWAY PURPOSES, the owner is entitled to compensation: *Imlay v. Union Branch R. R. Co.*, 68 Am. Dec. 392, and note. But the legislature may authorize the building of the road on such highway: *Commonwealth v. Erie etc. R. R. Co.*, 67 Id. 471, and note 485.

LAYING OF HORSE-RAILWAY TRACK in a public street is not a new servitude imposed for which the owners are entitled to compensation: Note to *Imlay v. Union Branch R. R. Co.*, 68 Am. Dec. 398. As to the power to build railroads in the streets generally, see *Case of Philadelphia etc. R. R. Co.*, 36 Id. 202, and note 210; *Nickerson v. New York etc. R. R. Co.*, 56 Id. 390, and note; *Murphy v. Chicago*, 81 Id. 307, and note.

INJUNCTION WILL NOT BE GRANTED where right is doubtful: *Roath v. Driscoll*, 52 Am. Dec. 352, and note 357. To entitle the complainant to an injunction he must show that irreparable damage has been or is being done: *Schurmier v. St. Paul etc. R. R. Co.*, 83 Id. 770; *Goodrich v. Moore*, 72 Id. 74, and note 78; *Gause v. Perkins*, 69 Id. 728, and note.

PRESUMPTION IS THAT OWNERS OF LAND on each side of street or highway go to the center of such boundary: *Paul v. Carver*, 67 Am. Dec. 413, and note 417; *Winter v. Peterson*, 61 Id. 678, and note.

CONVEYANCE OF LAND BOUNDED ON STREET or highway carries with it the fee to the center thereof: See cases cited *supra*, and *City of Dubuque v. Maloney*, 74 Am. Dec. 358; *Cox v. Freedley*, 75 Id. 584, and notes to these cases.

JOINDER OF PARTIES PLAINTIFF to abate a nuisance: See *State v. Ohio etc. R. R. Co.*, 71 Am. Dec. 309, and extended note on this question 311-316.

OBJECTION TO BILL ON GROUND OF MISJOINDER of parties should be raised by demurrer: *De Louis v. Meek*, 50 Am. Dec. 491.

HORSE-RAILWAY IS LEGITIMATE USE OF HIGHWAY: *State v. Laverack*, 34 N. J. L. 205; and the building and operating one in the streets of a city, with the consent of the governing power, does not impose a new servitude, and is not a taking of private property for a public use so as to entitle the owner of the fee to compensation: *Stroudinger v. City of Newark*, 28 N. J. Eq. 192; *West Jersey R. R. Co. v. Cape May etc. R. R. Co.*, 34 Id. 166; *Citizens' Coach Co. v. Camden Horse R. R. Co.*, 33 Id. 275; *Jersey City etc. R. R. Co. v. Jersey City etc. Horse R. R. Co.*, 20 Id. 66; *Richels v. Evansville Street R'y Co.*, 78 Ind. 268; *Attorney-General v. Metropolitan R. R.*, 125 Mass. 518; *Pater-*

son etc. Horse R. R. Co. v. Mayor etc. of Paterson, 24 N. J. Eq. 165, all citing the principal case.

LEGISLATIVE GRANT TO CORPORATION to build and operate a railroad in the streets of a city does not transfer any estate or interest therein except the right to use the streets or a public easement: *Camden Horse R. R. Co. v. Citizens' Coach Co.*, 31 N. J. Eq. 525, citing the principal case.

RULING IN PRINCIPAL CASE, that the owner of land bounded by a street or highway owns to the center thereof, is doubted, and not sanctioned in *Higbee and Riggs v. Camden etc. R. & T. Co.*, 20 N. J. Eq. 439, *Salter v. Jonas*, 39 N. J. L. 473, except in cases where such intent can be gathered from the deed.

BILL IS DEMURRABLE FOR MISJOINDER, where parties complain jointly, for relief on claims that are distinct and individual: *Chester v. Halliard*, 34 N. J. Eq. 342; *Morris etc. R. R. Co. v. Prudden*, 20 Id. 539, both citing the principal case.

IN CASES OF PUBLIC NUISANCE, COURT OF EQUITY WILL NOT ENJOIN, except where there is special and serious injury to the complainant, distinct from that suffered by the public: *Morris etc. R. R. Co. v. Prudden*, 20 N. J. Eq. 537. He is not entitled to the injunction upon showing that the law has been violated, or that his legal rights have been invaded; he must show an urgent necessity, or that irreparable injury is threatened: *West Jersey R. R. Co. v. Cape May etc. R. R. Co.*, 34 Id. 166, both citing the principal case.

OWNER OF SOIL UNDER HIGHWAY cannot be deprived of his property, or prejudiced in relation thereto, without compensation, even by authority of the legislature, under a constitution providing that private property cannot be taken for public use without compensation: *Morris etc. R. R. Co. v. Hudson etc. R. R. Co.*, 25 N. J. Eq. 368, citing the principal case.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

BEACH v. COOKE.

[28 NEW YORK, 502.]

LEGAL OWNER OF LANDS SUBJECT TO MORTGAGE MAY MAINTAIN ACTION TO COMPEL DISCHARGE OF MORTGAGE, if it be fully paid, or to redeem the land from its lien if it be not paid.

OFFER TO PAY ANY BALANCE DUE is not indispensable in an action to redeem from a mortgage.

EXCEPTIONS TAKEN BY PREVAILING PARTY, ON TRIAL, ARE NOT AVAILABLE, as a general rule, in the subsequent proceedings, on an appeal from the judgment by the unsuccessful party, where the prevailing party has not also appealed.

MORTGAGOR WHO HAS CONVEYED MORTGAGED PREMISES IS COMPETENT WITNESS FOR HIS GRANTEE, to show payment of the mortgage, in an action by the latter to procure its discharge, or for leave to redeem.

NEW TRIAL SHOULD BE GRANTED FOR ANY MATERIAL ERROR OCCURRING ON TRIAL BEFORE REFEREE, or in the findings of fact by him; but where the only error appearing is in the judgment which the referee directs to be entered on the facts found, the court may correct it by rendering the appropriate judgment.

ACTION to procure the cancellation and discharge of a mortgage. The mortgage was executed by Ephraim Beach to one Marvin, to secure the payment of fifty-two thousand dollars and interest, and the action was against Thomas B. Cooke, in his lifetime, who held the mortgage as assignee of the mortgagee. The plaintiff alleged that the mortgage was fully paid, that the lands covered by it had been conveyed to him, and he prayed to have it discharged. Thomas B. Cooke died before answer, and the present defendant, as executrix of his will, was substituted as defendant, and by her answer claimed that there was due to her upon the mortgage ten thousand

dollars and interest. On the trial, which was before a referee, Ephraim Beach, the plaintiff's grantor, was called as a witness on the part of the plaintiff, but was objected to on the ground that he was the plaintiff's assignor of the right to bring this action, and Mr. Cooke being dead, he could not be a witness. But the referee decided that the witness was competent to show payment of the mortgage, and his testimony was received. After hearing proof on the part of the defendant, the referee reported that less than thirteen hundred dollars, besides interest, remained due on the mortgage; but also found, as a conclusion of law, that the defendant was entitled to hold the bond and mortgage as security for the payment of such balance found due to her, and upon this ground decided that the complaint should be dismissed. Judgment was entered in accordance with the referee's report, and the plaintiff appealed to the supreme court, which modified the judgment, directing that the mortgage be given up and satisfied upon payment of the balance found due the defendant, with interest until paid, together with costs; and in case of the plaintiff's failure to redeem the premises by payment or tender of those sums within six months after written notice of the entry of that judgment, then that the judgment appealed from should be affirmed.

John H. Reynolds, for the appellant.

L. Tremain, for the respondent.

By Court, SELDEN, J. It is insisted by the defendant's counsel that the plaintiff is not a *bona fide* purchaser of the mortgaged premises, and for that reason is incapable of maintaining this action. It is a sufficient answer to this position to say that there is no finding of the referee to the effect that the purchase by the plaintiff was not made in good faith; nor did the defendant's counsel ask the referee to find any such fact. All that appears in the report on the subject is, that on the fifteenth day of June, 1853, Ephraim Beach conveyed the whole of the real estate described in the mortgage, by warranty deed, to the plaintiff. We must assume, from this finding, that the conveyance was made and received in good faith, and as we can review questions of law only, and not questions of fact, we are not required to look into the evidence to ascertain whether the referee would not have been justified in finding that the conveyance was obtained by the plaintiff in bad faith. The question of good faith, however, in the sense in

which it is presented here, does not appear to me to be material, provided the plaintiff has, in fact, the legal title to the land covered by the mortgage. He claims no prior equity against the defendant on the ground of being a *bona fide* purchaser. He stands upon his rights as the legal owner of the lands, subject to the mortgage, and if he is such legal owner, he has a right to maintain an action to compel the discharge of the mortgage if it be fully paid, or to redeem the lands from its lien if it be not paid; and it is wholly immaterial in this respect, in what manner, or for what consideration, or with what object, he acquired the title. The holder of the mortgage has no interest in this question. I have, however, looked at the evidence, so far as it is disclosed in the case, and can discover no ground for impeaching the good faith of the purchase by the plaintiff. He gave a mortgage for twenty-five thousand dollars to the grantor, in consideration of the conveyance, and there is nothing to show that he was advised of any special object on the part of the grantor in making the conveyance, or that he knew of the existence of the mortgage in question.

It is next insisted on the part of the defendant that no case was made by the plaintiff entitling him to equitable relief. That the only appropriate judgment upon the facts, as finally established, was that directed by the referee, dismissing the complaint, and leaving the defendant at liberty to commence an action to foreclose her mortgage if she saw fit.

The plaintiff stated in his complaint that he was the owner of lands encumbered, as appeared by the records in the county clerk's office, by a mortgage of fifty-two thousand dollars and many years' interest; that the mortgage was held by the defendant and was fully paid; and he prayed to have it discharged upon the record. By her answer the defendant claimed that there was due to her upon the mortgage ten thousand dollars and interest from 1839. After a very tedious trial, lasting more than five years, it is established by the report of the referee that the statements of the plaintiff were all true, except that a small sum, less than thirteen hundred dollars besides interest, remained due on the mortgage. It would certainly be a cause of reproach to the administration of justice, if, on that state of facts, the court could give no judgment except to dismiss the action, leaving the parties to repeat the same tedious process in another form, before the controversy between them could be ended. The law, however, is not justly

subject to any such reproach. Regarding this as an action *quia timet* merely, to remove the cloud of the mortgage from the plaintiff's title, upon the allegation that the mortgage was fully paid, it was entirely proper when it appeared by the evidence that a balance remained unpaid, to grant the relief demanded by the plaintiff conditionally, as was done by the court below. Judge Story, treating of the cancellation or delivery up of securities, says: "In all cases of this sort, where the interposition of a court of equity is sought, the court will, in granting relief, impose such terms upon the party as it deems the real justice of the case to require; and if the plaintiff refuses to comply with such terms, his bill will be dismissed. The maxim here is emphatically applied; he who seeks equity must do equity": 2 Story's Eq. Jur., sec. 693; see also secs. 705-707.

The complaint, however, embraced not only the features of a bill *quia timet*, but also of a bill to redeem. The plaintiff alleged that the mortgage was paid, and demanded judgment that it should be canceled and discharged on that account; but it was also prayed that the balance, if any was due on the mortgage, should be ascertained and determined by the judgment of the court, and that the other demands of the plaintiff against the defendant should be applied to the payment of such balance, if sufficient for that purpose, and if not sufficient, then to the reduction thereof, and that the bond and mortgage, if thereby paid, be canceled and discharged, and that the plaintiff have judgment for the balance of his demands, if any; to which was added the general prayer for such relief as the nature of the case should require. The plaintiff therefore contemplated the possibility of a balance being found due on the mortgage, and demanded such relief as would be agreeable to equity on that state of facts. There is no express general offer to pay any balance which might be found due, but it was held, under the former system of pleading, that such an offer in a bill to redeem was not necessary: *Quin v. Brittain*, Hoff. Ch. 353; and it is certainly not indispensable now. Were such offer necessary, it might fairly be inferred from the offer to pay the amount due by the application of the balance of other accounts. The case therefore was in form one in which it was proper to allow the plaintiff to redeem, and I can discover nothing in his position to render such redemption unjust or inequitable. The judgment, as modified by the supreme court, terminates the controversy between the parties in regard

to the mortgage, whether the plaintiff complies with the conditions imposed upon him or not. If he fails to redeem within the time appointed, the dismissal of his complaint as the consequence of such failure operates as a foreclosure of the mortgage: *Quin v. Brittain*, Hoff. Ch. 353; *Bishop of Winchester v. Paine*, 11 Ves. 199.

The principal remaining question which requires notice arises out of the admission of the testimony of the mortgagor, to show payment of the mortgage. The defendant having neither appealed from the judgment rendered upon the report of the referee, nor made any case on his part, it is questioned whether the exceptions taken by him are available in her behalf upon this appeal. As a general rule, exceptions taken by the prevailing party on a trial are not available in the subsequent proceedings on an appeal from the judgment by the unsuccessful party, where the prevailing party has not also appealed. Indeed, such exceptions, under ordinary circumstances, do not properly constitute any part of the case on appeal. Under the circumstances presented by this case, however, the defendant could not have sustained an appeal, whether the decision of the referee admitting the testimony now objected to was right or wrong. No appeal on her part could have raised that question, as she could appeal only from the judgment, and not from any decision of the referee, which did not affect the judgment; and the decision in question did not. She excepted to the testimony when it was given, but no use of it was made against her, and no judgment entered, by an appeal from which she could raise the question of the validity of her exception, until the judgment against her was pronounced by the supreme court, based upon the testimony thus excepted to. From that judgment she has appealed; and if the testimony was not legally admissible, it would seem to savor strongly of injustice to deny to her the benefit of her exception. If it were necessary now to determine this question, I should hold, as at present advised, that the exceptions taken by the present appellant upon the trial, and appearing upon the record, are available to her upon this appeal. There will, however, be no necessity of deciding this question, if the court shall concur with me in the conclusion to which I have arrived, that the testimony of the mortgage was properly admitted.

The provisions of the statute, which were in force when the cause was tried, and which are relied upon to sustain the objection to the testimony, are as follows: —

"Sec. 398. No person offered as a witness shall be excluded by reason of his interest in the event of the action.

"Sec. 399. The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended. When an assignor of a thing in action, or contract, is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter in his own behalf, and shall be so received. But such assignor shall not be admitted to be examined in behalf of any person deriving title through or from him against an assignee or an executor or administrator, unless the other party to such contract or thing in action whom the defendant or the plaintiff represents is living, and his testimony can be procured for such examination; nor unless at least ten days' notice of such intended examination of the assignor, specifying the points upon which he is intended to be examined, shall be given in writing to the adverse party": Code of Procedure, as amended in 1851, secs. 398, 399.

There is no ground whatever for the position that the witness was rendered incompetent by the first clause of section 399. He was in no sense a party to the action, nor was it prosecuted for his benefit. Whatever may have been the object or the consideration of the conveyance of the land by him, he could not afterwards question the validity of such conveyance; and having no interest in the land, and being released from liability upon his covenants, he could not be benefited by the plaintiff's success: *Jackson v. Stevens*, 16 Johns. 110; *McCrea v. Purmort*, 16 Wend. 460. Neither could the record in this case, whatever its results, be made use of for or against the witness in an action on his bond: *McLaren v. Hopkins*, 1 Paige, 18.

The objection based upon the other portion of section 399 is, I think, equally untenable. The conveyance of land is not an assignment of "a thing in action or contract": 2 Bla. Com. 397; 1 Chitty's General Practice, 99, note p; *Gillet v. Fairchild*, 4 Denio, 82; *Hudson River R. R. Co. v. Lounsberry*, 25 Barb. 597. The case was therefore not within the letter of the statute, and I am satisfied was not within the intention or object of its provisions. No inconvenience has ever resulted from the common-law rule admitting the testimony of the grantor of lands as a witness under such circumstances, and I see no propriety in extending the statutory exclusion to cases not clearly embraced by its terms.

If the plaintiff had not abandoned the claim to recover the alleged balance of the assigned accounts, the testimony would undoubtedly have been inadmissible, notwithstanding the limitation placed upon its effect by the referee; because a considerable part of it bore directly upon the question of such balance, through the accounts which the witness proved. The referee could not, so long as the question of the general accounts was before him, render the receipt of such testimony rightful by declaring that its application should be limited to another issue, in relation to which the witness was competent to testify. But this objection was removed when all claim to a recovery upon the accounts was abandoned. It has been questioned whether there was such an abandonment on the trial, but the report of the referee on that subject is conclusive here. The testimony of the mortgagor was therefore properly admitted.

It is insisted that if the decision of the referee was in any respects erroneous, the supreme court should not have pronounced a final judgment on the appeal, but should have ordered a new trial. If any material error had occurred on the trial, or in the findings of fact by the referee, a new trial would doubtless have been necessary; but the only error appearing in the case was in the judgment which he directed to be entered as the legal result from those facts. That error it was the province of the supreme court to correct; it has been corrected by the entry of the appropriate judgment, and that judgment should be affirmed, with costs.

DENIO, C. J., filed a concurring opinion.

DAVIS, HOGEBOM, and MULLIN, JJ., concurred.

INGRAHAM, J., filed a dissenting opinion.

WRIGHT and JOHNSON, JJ., concurred with INGRAHAM, J.

Judgment affirmed.

DENIO, C. J., in a separate opinion, maintained the sufficiency of the complaint "to authorize a judgment allowing the plaintiff to redeem if a balance should be found due on the mortgage." When the referee arrived at the result that the mortgage had not been fully paid, "he should have adjudged that the plaintiff redeem or be precluded, according to the usual course in redemption suits, or in suits having a double aspect, looking to satisfaction or redemption as the case on the accounts should require. It follows that, if there were no other difficulty, the general term was right in pronouncing such a judgment as the referee should have given." In reference to the defendant's suggestion, that the general term should have awarded a new trial,

and the answer of the judges at general term thereto, that the defendant might have appealed to the general term from the determination that only a certain amount was due, although the general judgment was in his favor, his honor says: "This answer is not satisfactory to my mind. Here the only judgment was in favor of the defendant, dismissing the complaint. It was no part of the adjudication that only a limited amount remained unpaid. That determination was in the finding, but was not one of the items of the judgment. It could no more be appealed from than any of the conclusions of fact or of law stated by the referee, or any of the reasonings of the court. But I am of opinion that it was competent for the general term to have reviewed the case on the exceptions taken on the trial and also upon the facts, so far as to determine whether the findings were warranted by the evidence, and that this court can review the case so far as questions of law were raised upon the trial by the exceptions, although the defendant could not and did not appeal to the general term." He further says: "It was the duty of the general term to modify the judgment so that it should conform to the legal result of the findings. We are to assume that it found no error to exist in the trial; that the exceptions taken in the progress of it were not well taken; and that the conclusions of fact found were not against the weight of evidence. So far as the conclusions of fact are concerned, the case ends with the general term; but as to the matters of law, we sit in review of its determination." As it regards the defendant's objection to the maintenance of the action on the ground that the plaintiff did not appear to be a *bona fide* purchaser of the mortgaged premises, his honor was of opinion that, as between the grantor of the premises and the plaintiff, the title passed from the former to the latter by the conveyance; and although the grantor admitted, in effect, in his testimony, that the conveyance was made to enable him to be a witness in the suit the plaintiff was expected to commence to procure the satisfaction of the mortgage, that was not a circumstance which could impair the effect of the deed as between the parties. If the plaintiff by that conveyance became the owner of the premises, as he clearly did, he was entitled to all the legal and equitable remedies which any owner would have to procure the removal of an alleged encumbrance which was inequitably set up or kept on foot against the land. The change of title to the mortgaged premises in this case let in the grantor as a witness, and he was competent as a witness, however the circumstance might operate against his credibility. His honor concluded in favor of the affirmance of the judgment of the supreme court.

PAYMENT OF MORTGAGE DEBT EXTINGUISHES MORTGAGE: *McMillan v. Richards*, 70 Am. Dec. 655, and cases collected in note 675; without any release from the mortgagee: *Perkins v. Sterne*, 76 Id. 72.

THE PRINCIPAL CASE IS CITED as sustaining the principle that every fact not expressly found shall be deemed to have been found and held in such manner as to uphold the judgment, in *Sheldon v. Sherman*, 42 N. Y. 490; it is cited as favoring the rule that in a suit simply to redeem, failure to pay the sum decreed to be due within the time allowed, the complaint being dismissed, will operate as a strict foreclosure, and the estate of the mortgagor be thereby forfeited, in *Bolles v. Duff*, 43 Id. 474; S. C., 10 Abb. Pr., N. S., 414; 41 How. Pr. 359; it is cited to the point that the power of enforcing the right of redemption is an equitable power residing in courts of equity jurisdiction, and is exercised upon equitable principles, in *Miner v. Beekman*, 11 Abb. Pr., N. S., 156; S. C., 42 How. Pr. 41; 1 Jones & S. 81; to the point that in a suit to have a mortgage canceled and satisfied, on the ground that

It has been paid, judgment alike establishing the amount due and authorizing a redemption on that basis is proper, in *Sutherland v. Rose*, 47 Barb. 148; and is cited to the power of the court to correct error by modifying the judgment, in *Woods v. Spalding*, 45 Id. 609.

THE PRINCIPAL CASE IS DISTINGUISHED in *Coff v. Dorland*, 57 N. Y. 566, in that the amount actually due on the mortgage had been ascertained at the trial. And it was held that the general term has no power, upon reversal of a judgment, to render judgment in favor of the appellant, unless the facts upon which its judgment is founded are agreed to by the parties or were found by the court or jury on the trial.

HARRIS v. MURRAY.

[28 NEW YORK, 574.]

INTEREST OF SPECIAL PARTNER IN LIMITED PARTNERSHIP cannot be levied upon and sold under an execution issued in an attachment suit brought against the members of the partnership.

RULE THAT MERE IRREGULARITY WILL NOT RENDER SALE UPON EXECUTION INVALID, if the execution be valid, has no application where a sale has been made of something which the sheriff had no authority to sell. And the attempt to obtain possession of the thing sold in such cases may be resisted by showing that the sheriff had no authority to make the sale.

PURCHASER AT SHERIFF'S SALE OF INTEREST OF SPECIAL PARTNER IN LIMITED PARTNERSHIP IS BOUND TO KNOW that such sale is illegal, and it is therefore unnecessary for the special partner, though present, to give any notice.

SPECIAL PARTNER IS NOT DEPRIVED OF HIS INTEREST IN LIMITED PARTNERSHIP by a levy thereon under an attachment, nor is he thereby deprived of the right to an account, or prevented from collecting any surplus over such claims as the sheriff has upon it.

THE sheriff, under an execution against Charles T. Harris, the plaintiff's intestate, sold his interest in the property of a limited partnership in which he was a special partner. The execution was issued in an attachment suit brought against the members of the firm, and the defendant, Murray, became the purchaser at the sale. The validity of the sale was denied, on the grounds stated in the opinion, but the court found as law that it was valid, and dismissed the complaint. This judgment was affirmed by the general term, and the plaintiff appealed.

George W. Parsons, for the appellant.

S. S. Harris, for the respondents.

By Court, INGRAHAM, J. There is no finding by the court, nor was any evidence offered to warrant the conclusion that the sale was made on any understanding, as claimed by the

plaintiff. Such understanding and alleged agreement is denied by Murray in his answer, and if the plaintiff expected any benefit therefrom evidence to prove the same should have been offered.

The main question in the case is, whether the sale under the executions was valid. The property sold was "the right, title, and interest of Harris, which he had on the 31st of August, 1854, or at any time afterwards, in the goods, chattels, assets, and accounts of the firm of N. Dougherty, at No. 101 Water Street."

The plaintiff presents two grounds of objection to the sale: 1. That the sheriff could not sell under an execution an interest in choses in action; 2. That the sheriff could not sell personal property under an execution, unless the same was in view at the time of sale, and then he should have sold the same in parcels.

It must be remembered that this was not a general partnership, but was formed under the statute authorizing limited partnerships, and the interest sold was that of one of the limited partners. This statute prohibits any interference by the special partner with the management of the property of the firm, or the withdrawal of any part of the original capital, and even of the receipt of interest on his advances, if such payment would reduce the original amount of such capital.

As the special partners cannot interfere with the property, nor take the control from the general partners, it follows that the sheriff on an execution has no such power. He cannot, on an execution against such partner, do anything with the partnership property that the special partner could not do. He therefore would have no authority to take from the general partners the partnership property for the purpose of selling the interest of the special partner in the property and assets of the firm; nor could he, as in the case of other partnerships, sell the interest of one partner in the property of the firm, and deliver the property in which such interest is sold to the purchaser. All that the sheriff, under such circumstances, could sell would be the interest of the special partner, if such interest could be sold under an execution. This question was fully examined in this court in *Stief v. Hart*, 1 N. Y. 20, in regard to property pledged by the debtor, so far as related to the right of the sheriff to take the property out of the possession of a party entitled to the exclusive possession of it. In that case, the property was pledged by the judgment debtor. The

sheriff levied upon the interest of the pledgor, and took the possession of the property from the pledgee, who brought replevin. The circuit judge charged in favor of the right of the sheriff to take such possession. The judges of this court were equally divided upon the question, and the judgment below was affirmed. Those judges who sustained the right of the sheriff to take the possession did so upon the ground that section 20 of the statute (2 R. S., p. 366) expressly authorized a levy on and sale of the right and interest of the pledgor in the goods pledged, and that section 23 required the same to be present at the time of sale. From the opinions delivered by the judges, I think it may fairly be inferred that none of them held the right of the sheriff, to take the property out of the possession of a party having the exclusive right of possession, would have existed independent of the authority conferred by section 20, and as that authority is limited to the case of goods pledged, the law as to taking such property out of the possession of a party entitled solely thereto remains unchanged.

And in *Mattison v. Baucus*, 1 N. Y. 295, Gardiner, J., while admitting that the interest of a mortgagor in personal property was subject to levy and sale under an execution, placed his decision upon the ground that the right to the possession for a limited period was in the mortgagee. But where, by the express terms of the mortgage, the mortgagee was entitled to the possession, he held the interest of the mortgagor to be a mere chose in action, not the subject of levy and sale under execution: See also *Marsh v. Lawrence*, 4 Cow. 467. In *Hull v. Carnley*, 11 N. Y. 501, the same distinction is recognized, and the cases which hold that possession in such cases is necessary to give validity to the levy are approved.

It must be conceded that under the law as it was before the code mere choses in action were not the subject of levy and sale under execution. The interest of Harris in the property of a limited partnership can hardly be said to be an interest in the property of the firm. He advanced to the firm a sum of money, which he is entitled to receive back, with interest, at the termination of the partnership. He is also entitled to a share in the profits. But he is to no further extent the owner of the property. Upon payment of these claims, the property would belong to the general parties.

By section 291 of the code, the existing provisions of law relating to property liable to sale on execution are made applicable to the executions issued by virtue of that act, ex-

cept when in conflict therewith. There is nothing in the code which would be in conflict with the law on this subject. The code, it is true (sec. 234), provides for a levy by attachment on all species of personal property, but section 235 prescribes the mode of enforcing such attachments, and section 237 directs how choses in action are to be applied to the payment of judgments by the sheriffs. In no case does it specifically provide for the sale of any such right of action.

There are many reasons why such a sale should not be sanctioned. The value of such an interest can never be known or disclosed to purchasers at the time of sale; and if the law directs that personal property shall not be sold under execution, except the same is present and can be seen by the purchasers, surely the same principle requires a different mode of disposing of an unsettled claim against a firm than to sell it by sheriff's sale. No purchaser, unless one interested in the partnership, could know or ascertain its value, and such a mode of disposition would be a sacrifice of an interest in a firm very inconsistent with a due administration of justice.

It is said, however, that whether the sale was regular or irregular is immaterial, because the executions were valid. That would undoubtedly be so if it was a mere irregularity in the sale, and the remedy would be by motion to set aside the sale. But that rule does not apply where the sale has been made of something which the sheriff had no authority to sell. In such cases the attempt to obtain possession of the thing sold may be resisted by showing that the sheriff had no authority to make the sale. The one is a want of jurisdiction; the other a mere irregularity.

It is also insisted that Harris was estopped from objecting to the validity of the sale because he was present and suffered the sale to proceed without objection. There are two sufficient answers to this objection. The one is, that Harris had no knowledge which he withheld so as to induce others to act who would not have done so if he had communicated the same at the sale. It was apparent on the face of the sheriff's notice. He was selling an interest in partnership property. The purchaser ought to have known, as well as Harris, that such sale was illegal; and it was therefore unnecessary for Harris to give any notice. The other reason is, that Murray, who seeks to avail himself of the sale, was a partner, and had all the knowledge which Harris had. There was nothing to communicate to Murray on this subject which would have

prevented his action in purchasing at the sale, and which was not known to him at the time.

Nor did the fact of a levy having been made under the attachment deprive Harris of his interest in the firm. There had been no appropriation of that interest by the sheriff. The accounting would, of course, be subject to any claim which the sheriff could make upon it, but did not deprive Harris of his interest, nor prevent him from collecting any surplus over such claims as the sheriff had upon it.

I am of the opinion that the judgment should be reversed, and a new trial ordered; costs to abide the event.

DENIO, C. J., filed a concurring opinion.

SELDEN, WRIGHT, and JOHNSON, JJ., concurred in the above opinions.

DAVIS and MULLIN, JJ., were for affirmance.

HOGEBOM, J., took no part in the decision.

Judgment reversed.

DENIO, C. J., was of opinion that the interest of Harris in the limited partnership was embraced under the denomination of evidences of debt or of debts, against the sale of which on execution the statute contained a positive inhibition, and that such interest was not in the nature of corporate stock, which might be thus sold. But if wrong in this position, he maintained there was another ground upon which the purchase by Murray could not be upheld. "By the instrument signed by all the partners at the same time the articles for copartnership were executed, it was agreed that if the plaintiff should fail to pay his outstanding private obligations, which included the notes to Abbott, his interest in the profits as a special partner was to cease from the date of his failure to discharge such obligations, and thereafter the money contributed was to be a debt against the other partners, payable with annual interest at seven per cent on the 31st of December, 1856. This instrument was given in evidence on the trial, and it showed that the plaintiff's interest was a debt in the strictest sense, and that the sheriff should have retained the evidence of it, and collected the interest as it accrued, and the principal when it fell due." A separate opinion written by his honor thus concludes: "In whatever light we regard the circumstances, I am of opinion that the auction sale was a nullity, and that it passed no interest to Murray, the purchaser. The suit was not for an accounting upon the precise footing of a debt *in numero* against the other partners, but it claimed the benefit of the plaintiff's interest in the concern, and if it was in the nature of a debt instead of the share of a partner, the plaintiff should not have been turned out of court for a variance which did not surprise or mislead anybody. The plaintiff sets out the agreement under which the interest was turned into a debt, and that instrument was given in evidence on the trial without objection, and the facts which produced the conversion were proved. There is no valid pretense that Harris, the original plaintiff, was estopped by being present at the sale.

He neither said nor did anything to waive his rights, or to entrap Murray, the purchaser. That person knew all the facts which went to show the invalidity of the sale as well as the plaintiff, and both are chargeable with a knowledge of the law. It was a sale *in invitum* under pretended legal process, and the purchaser bid at his peril. If he could sustain it he got the plaintiff's money for less than one fifth part of its amount. If the proceeding was illegal or inoperative, he failed to make a great speculation. He took his chance, and must abide the result. I am of opinion that the judgment should be reversed, and a new trial awarded."

ATTACHMENT OF PARTNER'S PROPERTY FOR FIRM DEBT: See *Allen v. Wells*, 33 Am. Dec. 757; *Kirby v. Schoonmaker*, 49 Id. 160.

LIABILITY TO EXECUTION of partner's interest in property of firm: See *Burrall v. Acker*, 35 Am. Dec. 582, and note 587; *Hubbard v. Curtis*, 74 Id. 283.

COURT OF LAW WILL NOT HESITATE, AS BETWEEN PURCHASER and the original parties to the suit, to set aside an execution sale on account of fraud or irregularity: *McLean County Bank v. Flagg*, 83 Am. Dec. 224, and note 227.

THE PRINCIPAL CASE IS CITED to the point that property in pledge cannot, at common law, be levied on under execution against the pledgor, and it requires a statute to give such right, in *Seymour v. Newton*, 17 Hun, 33.

POTTER v. MERCHANTS' BANK.

[28 NEW YORK, 641.]

CASHIER OF BANK HAS POWER TO TRANSMIT NOTE FOR DISCOUNT AND COLLECTION to another bank, and to transfer the title thereto to the latter.

MERE CLERK, ACTING AS CASHIER IN LATTER'S ABSENCE, HAS NO AUTHORITY to transfer any of the notes or securities of the bank, unless such authority has been conferred on him by the directors. The cashier cannot clothe him with any more of his power than is necessary to enable such clerk to carry on the usual and ordinary business of the bank.

BANK CLERK, INTRUSTED BY CASHIER WITH ORDINARY BUSINESS OF BANK, HAS POWER to transmit notes owned by the bank, or held by it for collection, and payable in other places, or at other banks, to its agents for that purpose, and may indorse such paper for the bank, when necessary, to vest in the collecting agents such title as is required.

AGENCY OF COLLECTING BANK TERMINATES after demand of a note forwarded to it for collection; and a refusal to return the note is evidence of a conversion.

JURISDICTION MAY BE ESTABLISHED, *prima facie*, by recitals in the record.

SUPREME COURT HAS JURISDICTION, BY STATUTE, TO APPOINT RECEIVERS in cases of insolvent corporations; and when an order is made appointing such an officer, the presumption is, that all things were done required by the statute to be done, in order to authorize it to make such order.

PRIMA FACIE MEASURE OF DAMAGES IN ACTION FOR CONVERSION OF PROMISSORY NOTE is the amount which the maker of the note agreed to pay, and interest. But the defendant in such action may prove the insolvency of the maker, and thereby lessen the damages.

APPEAL from a judgment of the supreme court. Action by the plaintiff, as receiver of the Medina Bank, to recover damages for the conversion of a promissory note owned by the bank. The note was dated May 16, 1861, payable ninety days from date, and was indorsed by the payee. The defendant had been for some years the collecting agent for the Medina Bank, and on the 3d of June, 1861, Beach, who was clerk of said bank, and while in charge of the bank pursuant to the directions of the cashier, but without authority from either the president or cashier so to do, and in their absence, forwarded the note to the defendant and directed it to be placed to the credit of the Medina Bank. The note was not indorsed by any of the then officers of the bank, but one Brown, who had been president of the bank, wrote over the indorser's name the words, "Pay to the Merchants' Bank, or order." The defendant received the note, but the cashier refused to enter it for discount, but did enter it for collection, and on the 5th of June made application for the indorsement of the Medina Bank, or evidence of a transfer by it to the defendant, which request was never complied with. The Medina Bank stopped paying deposits on the 4th of June, and on the 8th stopped paying its bills. The plaintiff was appointed receiver on the 10th of June, and before commencing this action he demanded said note of the defendant, and was refused, the defendant claiming a lien on the note for a balance of account due from the Medina Bank. The plaintiff had a verdict for the amount of the note and interest, judgment was ordered to be entered thereon, and the defendant appealed.

Learned and Cook, for the appellant.

S. E. Church, for the respondent.

By Court, MULLIN, J. The Bank of Medina owned the note in question, and in order that the defendant may retain it from its lawful owner, it must appear that the defendant obtained it *bona fide* before maturity, in the regular course of business, and for value paid, or that said note was transferred to it by the Bank of Medina, with the intention of transferring to the defendant the title thereto.

It is not pretended that the defendant has paid value for the note, or that it is entitled to be considered as the *bona fide* holder of commercial paper.

All questions, therefore, as to the presumed or implied authority of the officers of the Bank of Medina, which usually arise

between banks and the *bona fide* holders of securities of the bank for value, and which such officers have transferred or created in violation of their duty to the bank, are out of this case. And the inquiry is as to the actual power which the officer had in this case to transfer to the defendant this note, and thereby pledge the same as security for the debt of the bank.

The indorsement to the defendant was made by Brown, who was not at the time an officer of the bank, and although he had been, yet the defendant's cashier knew he was an officer no longer. So far, then, as the handwriting in which the indorsement was made could affect the question, the defendant knew it was not indorsed by any of the then officers of the bank.

The note was transmitted by Beach, who was a mere clerk, in the absence of the cashier of the bank. He was at the time of the transmission of the note acting as cashier, and clothed for the time with the powers of that officer, so far forth as the business of the bank demanded the services of that officer. Story, J., in *Wild v. Passamaquoddy Bank*, 3 Mason, 505, discusses the power of the cashier as follows: "The cashier of a bank is, *virtute officii*, generally intrusted with the notes, securities, and other funds of the bank, and is held out to the world by the bank as its general agent in the negotiation, management, and disposal of them. *Prima facie*, then, he must be deemed to have authority to transfer and indorse negotiable securities held by the bank for its use and in its behalf. No special authority for this purpose need be proved. If any bank chooses to depart from this general course of business, it is certainly at liberty to do so, but in such case it is incumbent on the bank to show that it has interposed a restriction, and that such restriction is known to them with whom it is in the habit of doing business." It cannot be doubted but that the cashier had the power to transmit the note in question to the defendant for discount and collection, and to transfer the title thereto to the defendant. This would have been within the general scope of his authority as defined by Justice Story, and in accordance with the practice of the bank for two years.

But although such was the power of the cashier, it does not follow that Beach, while acting for the cashier, had the same power. Beach, as clerk, had no authority to transfer any of the notes or securities of the bank. The directors had conferred on him no such power, and the cashier could not clothe him with any more of his power than was necessary to enable

the latter to carry on the usual and ordinary business of the bank. Beach, in the absence of the cashier, had authority, undoubtedly, to pay checks, receive payment of notes, and surrender them to the persons entitled, and in a word, to do whatever was necessary and proper to be done in the ordinary course of business.

I do not doubt but that Beach had power to transmit notes owned by the bank or held by it for collection, and payable in other places or at other banks, to its agents for that purpose, and as, in order to do so, it becomes necessary to indorse the paper for the bank, he had power to make such indorsement. But he had no power to pledge its securities, unless they become pledged by the mere act of transmitting for collection.

It seems to me that Beach had the power to send forward this note for collection, and that the defendant legally acquired possession of it for that purpose.

The cashier had refused to send forward this note to the defendant. Whether Beach knew of this refusal does not appear, and we must assume that he did not. This refusal by the cashier shows that it was not the intention of the bank to transfer the note to the defendant, and Beach's authority was therefore limited to the making of such transfer of the note as the interests of the bank required to be made. He could transmit it for collection, but could not otherwise transfer or dispose of it.

It is said that the defendant received the note in the usual course of business, without notice of any want of authority on the part of the officer transmitting it to transfer it, and that they must be considered *bona fide* holders for value. I have already said that the defendant is not a *bona fide* holder for value, and it must rest its defense on the right acquired, if any, by possession of a note acquired through an officer of the bank in the same manner in which for two years past it had acquired title to notes from the Bank of Medina. But it was competent for the Bank of Medina at any time to cease to transmit to the defendant paper for discount or collection, and when it did so, the defendant could not legally acquire any title to or interest in the notes of that bank, unless through third persons.

The Bank of Medina did not transmit this note, nor did it assent to any transfer of it to the defendant. The act of Beach was wholly without authority, and in favor of the bank if it

was intended to do more than transmit the note for collection.

Again, the defendant must have known that the act of Beach, so far as it was claimed to amount to a pledge of the note, was unauthorized. Although notes had been sent to the defendant indorsed as this one was, yet it was so seldom done that the cashier could recall no instance of the kind, and knowing that mere possession of the note thus indorsed might not enable the defendant to hold it as against the bank, application was made for the indorsement of the bank, or evidence of a transfer by it to the defendant. This request was never complied with. The Bank of Medina therefore never authorized the transfer to the defendant, nor ratified it. It is true, the bank did not repudiate the act of Beach. But it was not called on to do so, and its silence has not in any manner prejudiced the defendant.

I am of the opinion, therefore, that Beach had the power to transmit the note to the defendant for collection, and to vest in it such title as was necessary and proper to enable it to accomplish that object; but he did not have power to transfer any other or higher title thereto; and that the defendant did not, as against the plaintiff, acquire any lien on said note for any balance due from the Bank of Medina.

If I am right on this proposition, it becomes unnecessary to discuss the question whether a bank acquires a lien on the securities in its possession belonging to a customer for any balance which may be due to it on account.

The defendant, after it acquired possession of the note, held it as the agent of the Bank of Medina, for the purposes of collection, and as the demand was made before maturity of the note, there is no ground for claiming that a title to it passed to the defendant. The demand terminated the agency, and the refusal was evidence of a conversion.

I do not deem it necessary to inquire what effect, if any, the pending insolvency of the bank had on the right of the officers of the Bank of Medina to transfer this note to the defendant, to apply on the balance due from it to the defendant, if there was an intention to transfer it, because there is no finding in the case whether, at the time of the transfer, insolvency was contemplated or even conjectured.

After the plaintiff closed his evidence, the defendant moved for a nonsuit, on the grounds: 1. That the pendency of an action in favor of Horton against the Medina Bank, in which the

order for the appointment of a receiver purported to be made, was not proved; and 2. That there was no evidence of the value of the note.

The only evidence in relation to the appointment of the receiver was a copy of the order of appointment and the giving of a bond in conformity thereto. The pendency of the action was not proved except by recital in the order, and the objection is, that a fact material to jurisdiction cannot, in a case like this, be proved by recital in an order or record, but must be proved *aliunde*. It is urged that the power to appoint receivers in cases of insolvent corporations is given by statute, and the mode of procuring the appointment is fully and particularly prescribed; and although the supreme court is one of general jurisdiction, yet in the exercise of powers thus specifically conferred there is no presumption of jurisdiction in its favor, and in such cases it stands on the same footing with an inferior court. But it was held by this court in *Bangs v. Duckinfield*, 18 N. Y. 592, that the supreme court, in the appointment of a receiver, under section 36 (2 R. S. 463), "of proceedings against corporations in equity," is a court of general jurisdiction, and not as exercising a special statutory power. The question then is, Could the pendency of the action in which the order appointing the receiver was made be proved by the recitals in the order? It cannot be denied that the pendency of the action after personal service of the summons and complaint, and the appearance by the corporation on the motion, are fully recited.

There is a great diversity of opinion on the question; nevertheless, I apprehend the weight of authority is in favor of the doctrine that jurisdiction may be established *prima facie* by recitals in the record. In 2 Cowen and Hill's Notes, 1016, the authors say: In New York, we may safely consider these jurisdictional recitals as *prima facie* evidence; and they cite in support of the proposition *Barber v. Winslow*, 12 Wend. 102, in which Justice Nelson, delivering the opinion of the supreme court, adopts the ruling in *Jenks v. Stebbins*, 11 Johns. 224. These were cases of insolvents' discharges, and the recitals were in the record of an inferior jurisdiction. If recitals are evidence of the performance of acts necessary to be done to confer jurisdiction on one court, and for one purpose, they must be for all. There cannot be one rule of evidence for the superior and another for inferior courts. In addition to the cases cited *supra* from our own reports, the following cases

may be referred to: *Shumway v. Stillman*, 4 Cow. 292 [15 Am. Dec. 374]; S. C., 6 Wend. 447; *Starbuck v. Murray*, 5 Id. 148 [21 Am. Dec. 172]; *Borden v. Fitch*, 15 Johns. 141 [8 Am. Dec. 225]. The cases in the courts of other states are collected in the notes to *Mills v. Duryea*, 2 Am. Lead. Cas. 597, and *McElmoyle v. Cohen*, 2 Id. 603 et seq., and it will be found that the courts agree that a recital in the record of appearance or of service of process is evidence of the fact recited, and they differ only as to whether the fact recited is conclusive or only *prima facie*. Our courts hold the recital *prima facie* only.

The case of *Sibley v. Waffle*, 16 N. Y. 180, is apparently in conflict with the cases above referred to. In that case the plaintiff sued in ejectment, to recover four acres of land purchased by him at a sale made by the administrator of one Dusenbury, under an order of the surrogate of Monroe County. It appeared on the trial that the widow and all the heirs except two resided in the county of Monroe; the absent ones resided in Ohio. The order of sale recited the due publication of the order, and that the administrator had done all that was required by the statute to be done. But it also appeared that the order of the surrogate requiring the heirs and next of kin to appear was not published in the state paper for the number of weeks required by the statute to constitute a valid service on the absent heirs, and this court held the recital of due publication did not show jurisdiction in the surrogate to make the order of sale. The learned judge who delivered the opinion of the court did not refer to the cases cited, nor profess to overrule them or the principle established by them, and hence I conclude that all this court intended to decide was, that the recital of due publication did not overcome the proof that the order to show cause was published only five instead of six weeks as required by the statute. If such was the view of the court, then, although full effect had been given to the recital, yet, as it was only *prima facie*, it was overcome by direct evidence that jurisdiction was not acquired by the surrogate.

Whether a recital of a jurisdictional fact in a record is or is not evidence of such fact, I am of the opinion that, in the absence of any recital, the law presumes that the court had jurisdiction to make the order in question. The court making it is a court of general jurisdiction, and it had by statute jurisdiction to appoint receivers in cases of insolvent corporations; and when an order is made appointing such officer, the

presumption is, that all things were done required by the statute to be done in order to authorize it to make such order. This conclusion seems to follow necessarily from the decision in the case of *Bangs v. Duckinfield*, 18 N. Y. 592, that in appointing a receiver in such cases the supreme court acts as a court of general jurisdiction, and not as exercising a special statutory power.

The instruction to the jury that *prima facie* the damages which the plaintiff was entitled to recover were the amount which the maker of the note agreed to pay, and interest thereon, was correct. This is held to be the measure of damages in 2 Phill. Ev., Cowen and Hill's ed., 228; 2 Parsons on Contracts, 471; *Decker v. Mathews*, 12 N. Y. 324; Sedgwick on Damages, 513; *Paine v. Pritchard*, 12 Eng. Com. L. 261.

It was competent for the defendant to prove the insolvency of the maker, and thereby lessen the damages; but in the absence of any evidence of the want of ability to pay, the presumption is, that he is solvent, and able to pay the note: *Walred v. Ball*, 9 Barb. 271.

It was insisted on the trial that the proper question to put to the witness in order to arrive at the measure of damages was, What was the value of the note? and the ground on which the right to put the question rests is, that such is the inquiry in all other cases where the value of property is sought to be recovered. The general rule is, that the value of property must be ascertained by answers to the direct questions as to its value. And the reason is, that persons are examined who know its value, and can speak from their own personal knowledge in relation thereto. But this rule cannot apply to choses in action; they have no intrinsic value, as a horse or an acre of land has. Their value depends on the pecuniary condition of the parties liable thereon. And hence, in such cases, the direct and proper inquiry would be, Are the parties to a bill or note, or other choses in action, solvent and able to pay their debts? But as the law presumes that fact in favor of the plaintiff, it is not necessary for him to prove it; and the burden is therefore cast upon the defendant to disprove it.

I am of the opinion that the rulings on the trial were right, and that the judgment should be affirmed, with costs.

DENIO, C. J., concurred upon the point respecting the value of the note, but was for reversal on the single ground of receiving in evidence the final order for appointment of receiver without proof of the preliminary proceedings.

INGRAHAM, J., concurred, except upon the point respecting the value of the note.

SELDEN, J. The only evidence which was produced by the plaintiff to show his title as receiver was the order appointing him receiver, made at a special term of the supreme court, and the execution and filing of a bond in pursuance of the terms of the order. It is insisted that this is not sufficient, without additional proof showing the pendency of the action in which the order was made. Such further proof was not necessary. The appointment of a receiver was within the jurisdiction of the court; and where an order is made by a superior court which it has power to make under any circumstances, "all jurisdictional steps and matters of regularity are to be presumed": *People v. Nevins*, 1 Hill, 154, 159; *Foot v. Stevens*, 17 Wend. 483. In making such appointment the court acts as one of general jurisdiction, and not under special statutory power: *Bangs v. Duckinfield*, 18 N. Y. 592. The evidence, therefore, whether conclusive or not, was at least *prima facie* sufficient to establish the plaintiff's title. "Nothing shall be intended to be out of the jurisdiction of a superior court but what expressly appears to be so; nor within the jurisdiction of an inferior court but what is expressly alleged to be so": *Peacock v. Bell*, 1 Saund. 74.

The teller of the Medina Bank had no authority to transmit the note of Weld to the Merchants' Bank, and the latter bank refused to accept it on the terms on which it was transmitted. There was thus a double defect in the defendant's claim of title; and the refusal of the defendant to surrender the note on the demand of the plaintiff amounted to a conversion of it. The right of the plaintiff to recover was therefore unquestionable. The only real controversy between the parties related to the amount of damages.

There was no error in the charge of the judge, nor in his refusal to charge as requested. But on the trial, a witness, after testifying that he was acquainted with the parties to the note, and showing a somewhat intimate knowledge of their pecuniary condition, was asked by the defendant's counsel what, in his opinion, the note in question was worth. This question was excluded, and the defendant's counsel excepted. In this respect I think the court erred. As a general rule, undoubtedly, witnesses, other than experts, are required to testify to facts, and not to give opinions; but in determining the value of property, the well-established rule in this state is otherwise;

and I am unable to see any valid reason for making an exception in regard to the value of choses in action. It may be said that the witness can state the facts which go to determine the value, and that the jury will then be as capable of judging of the value as the witness. If the witness could state with perfect accuracy all the circumstances which constitute the basis of his own judgment, this position would be correct; but the impossibility of doing this has caused the adoption of the practice of allowing the witness to give his opinion upon questions of value, along with the reasons, as far as he is able to give them, upon which such opinion rests. The argument in favor of confining the witness to the facts, and leaving the jury alone to deduce the conclusion, as to value, would apply with as much force to many of the cases where opinions are allowed as to the present case: *Clark v. Baird*, 9 N. Y. 183. For this error I think a new trial should be granted.

The other question addressed to the same witness, calling for his opinion in regard to the solvency of one of the parties to the note, was properly rejected. The question relating to the solvency of the maker, and that as to the value of the note, are by no means identical. There are many circumstances under which a note may have some value, although the maker be insolvent. The distinction between the two questions is not very broad, but that relating to solvency was not within the exception to the rule that opinions are not evidence, which is established in regard to the value of property, and I am not disposed to extend that exception to cases not clearly within it.

HOGEBROOM, DAVIS, WRIGHT, and JOHNSON, JJ., were in favor of affirmance.

Judgment affirmed.

POWERS AND DUTIES OF BANK CASHIER: See *Merchants' Bank v. Rouse*, 50 Am. Dec. 394; *Farrar v. Gilman*, 36 Id. 766; *Corser v. Paul*, 77 Id. 753, and note 759; *Ryan v. Dunlap*, 63 Id. 334; *Sturges v. Bank of Circleville*, 78 Id. 296.

WHEN BANK IS LIABLE TO HOLDER OF NOTE FALSELY CERTIFIED BY TELLER: *Meads v. Merchants' Bank*, 82 Am. Dec. 331.

JURISDICTIONAL FACTS NOT APPEARING OF RECORD may be shown by evidence *aliunde*: *Williams v. Cammack*, 61 Am. Dec. 508.

EVERY PRESUMPTION IS MADE IN FAVOR OF JURISDICTION OF SUPERIOR COURTS: *Cooper v. Sunderland*, 66 Am. Dec. 52, and note 70; *Butcher v. Bank of Brownsville*, 83 Id. 446, and note 450.

MEASURE OF DAMAGES IN TROVER for notes or other choses: See *Robbins v. Packard*, 76 Am. Dec. 134; *Connor v. Hillier*, 73 Id. 105, and note 106.

CITATIONS OF PRINCIPAL CASE are as follows, and to the points stated: The duty of a bank clerk or bookkeeper, as such, is limited to the entry of what the bank officers may direct, and he has no right to negotiate for parties in reference to the affairs of the bank: *Whitehouse v. Bank of Cooperstown*, 48 N. Y. 242. Where there is no authority for the act called in question, a general or particular usage in a given direction will bind a bank to respond to a third party who deals with it in good faith: *Pope v. Bank of Albion*, 57 Id. 131. Solvency, and not insolvency, is presumed in the absence of proof on the subject: *Hackley v. Draper*, 4 Thomp. & C. 621; as a promissory note is presumed to be collectible in the absence of proof to the contrary: *Hart v. Hoffman*, 44 How. Pr. 170. In pleading the judgment of an inferior court in a collateral action, the facts showing jurisdiction must be pleaded, but may be proved *prima facie*, either by recitals in the proceedings or by evidence *aliunde*, if doubt is thrown upon them: *Rowe v. Parsons*, 6 Hun, 344; *Bolton v. Jacks*, 6 Robt. 202. The production and proof of an order, made by a court or judge authorized by law to make it, in proceedings supplementary to execution, reciting the facts necessary to give such court or judge jurisdiction to act in the proceedings, furnishes conclusive evidence of the regularity of such order, when questioned collaterally, and *prima facie* evidence of the existence of the facts necessary to confer jurisdiction: *Wright v. Nostrand*, 94 N. Y. 45; and see *Cooper v. Bean*, 5 Lana. 322; *Miller v. Brown*, 56 N. Y. 386. The recitals in record of judgment may be used to establish jurisdiction *prima facie*: *Bosworth v. Vandewalker*, 53 Id. 600. The value of an obligation is *prima facie* its face: *Loomis v. Mowry*, 8 Hun, 312; *Furniss v. Ferguson*, 34 N. Y. 492. The measure of damages for converting a negotiable promissory note is *prima facie* the amount of the note, with the interest: *Greer v. Mayor etc.*, 3 Robt. 410; *Thayer v. Mauley*, 8 Hun, 551; but this is where the note is the obligation of a third party, and its value is to be presumed to be the amount secured by it, unless some evidence is given tending to impair that value, such as the insolvency of the maker, or the invalidity from some cause of the note: Id. The principal case is also cited in *Hahn v. Kelly*, 34 Cal. 428, as bearing upon the questions arising in that case.

PORTER v. PURDY.

[29 NEW YORK, 106.]

ACTS IN NATURE OF ADJUDICATIONS, WHICH, IF ERRONEOUS, MUST BE CORRECTED BY DIRECT PROCEEDINGS. — When in special proceedings in courts or before officers of limited jurisdiction, they are required to ascertain a particular fact, or to appoint persons to act in such proceedings, having particular qualifications, or occupying some peculiar relation to the parties or the subject-matter, such acts when done are in the nature of adjudications, which, if erroneous, must be corrected by a direct proceeding for that purpose; and if not so corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be.

WANT OF JURISDICTION, EFFECT OF, AS TO OFFICERS WHO EXECUTE PROCESS FAIR ON ITS FACE. — As a general rule, want of jurisdiction ren-

ders utterly void the process and proceedings of courts and officers, but third persons whose duty it is to execute such process or to give effect to such proceedings cannot be made trespassers by obeying such process, unless the want of jurisdiction is apparent on the face of such process or proceedings. The person or officer issuing such process, etc., is the one liable.

OFFICER WHO EXECUTES PROCESS FAIR ON ITS FACE, BUT ISSUED IN FACT WITHOUT JURISDICTION, IS PROTECTED, because it would be inequitable and unjust to hold him responsible for acts of others over whom he had no control, and for defects of which he had no notice.

OFFICER IS NOT TO BE HELD TRESPASSER UNLESS HE KNOWS OR HAS REASON TO KNOW THAT HE IS ACTING WITHOUT JURISDICTION. Thus the commissioner of highways or trustees of a village should be held not liable when they are required to act upon evidence which they know nothing about.

ASSESSMENTS, ATTACKS ON, FOR WANT OF JURISDICTION. — Assessments ordered by town trustees to defray the expense of building a sewer may be assailed in a direct proceeding to review or reverse the same for want of jurisdiction of the assessors appointed to assess the expense, arising from the fact that one of them was not a freeholder; but the assessment is not assailable on that ground in an action against the trustees, nor in other collateral proceedings.

ASSESSMENT, VOIDABLE IF PROCEEDED AGAINST DIRECTLY, IS GOOD if no objection is made in the proper manner.

EXPENSES OF SURVEY AND FEES OF ASSESSORS ARE PART OF EXPENSE OF WORK OF BUILDING SEWER, and may be properly added to the contract price, and inserted in the warrant.

ACTION originally brought in a justice's court to recover damages for the unlawful seizure and sale by the defendants of a parlor stove and pump, the property of plaintiff, and valued at about eleven dollars. The sale was justified by the defendants on the ground that they were trustees of the village of Medina, in the county where the suit was brought, duly incorporated by legislative enactment passed in 1855, and that, as such trustees, they had ordered a sewer to be made in one of the streets of said village; that they had authority to do so by the town charter; that they caused the expense thereof to be assessed on the property of the persons benefited; that five freeholders were appointed as assessors for that purpose; that said officers assessed the said expense on those liable to pay the same; that the plaintiff was then a resident of said town; that a portion of said expense was assessed on him; that a lawful warrant was issued to the collector, and that the plaintiff refusing to pay the amount of the assessment against him, the collector sold the stove and pump, and thus satisfied the assessment. The plaintiff on the trial put in evidence the minutes of the proceedings of the board of trustees,

directing the making of the sewer, its dimensions, and mode of construction, and relating the letting of the work and the appointing of five assessors to assess the expense on the owners and others benefited by the sewer. Against the objection of defendants' counsel, it was proved that one of the assessors did not own any land in fee in said village at the time of his appointment; that he had no estate for life in any lands therein; and that he only held a contract for the purchase of some land worth sixteen hundred dollars, on which he was owing some ninety dollars. It further appeared in evidence that the expenses of making a survey and maps of the said sewer and the fees of the assessors were added to the price paid for the work on the sewer. The addition of these sums to the actual cost of the work in excavating and constructing the sewer, and the appointment of one of the assessors who was not a freeholder, constituted the only grounds on which the tax was claimed to be illegal. Judgment for defendants, which was affirmed by the county court. The general term of the supreme court reversed the judgment, on the ground that the defendants did not have jurisdiction to issue the warrant against the property of the plaintiff, because one of the assessors was not a freeholder. Defendants by permission appealed to this court.

Church and Sawyer, for the appellants.

Bessac and Bullard, for the respondents.

By Court, MULLIN, J. The attention of the learned judges by whom this case was decided in the court below could not have been called to the case of *Van Steenberg v. Bigelow*, 3 Wend. 42, or they would not have reversed the judgment of the county court. The case is directly in point, and decides the very question on which the learned judges reversed the judgment. In that case the plaintiff sued the defendant, who was agent of the Bristol Turnpike Company, in trespass, for laying the road of that company over his land without having acquired, as he (the plaintiff) insisted, the right so to do. The defendant justified under an act of the legislature incorporating said company. The plaintiff on the trial proved the laying of the road over his land, and the damages sustained thereby, and rested. The defendant put in evidence the act incorporating the company, and the proceedings required thereby, in order to enable the company to acquire a right to build their road over the land of individuals, and amongst other proceedings

required, was the appointment by the first judge of Ulster County, if the parties could not agree on the amount of damages, of three persons as appraisers, who, the act required, should be freeholders. After the defendant rested, the plaintiff offered to prove that one of the three appraisers appointed was not a freeholder. The defendants' counsel objected to the evidence, and it was rejected. The plaintiff was nonsuited, with leave to move to set it aside. Savage, C. J., delivering the judgment of the court upon the point under consideration, says: "The judge was certainly right in rejecting the proof that one of the appraisers was not a freeholder. Whether the appraisers were freeholders or not was not inquirable into collaterally. The appointment has been made by an officer whose duty it was to have appointed freeholders, and none other. If he erred in that particular, the appointment might have been examined in this court on *certiorari*, and if illegally made would have been set aside."

There are certain points of difference between the case cited and the one before us, but these differences do not affect the principle, which applies to both.

In *Van Steenberg v. Bigelow*, 3 Wend. 42, the appraisers were appointed by a judge, and not by the defendant or the company for which he acted. In this case the defendants themselves made the appointment. There is a principle pervading the cases in which questions of jurisdiction have arisen, and in which the effect of a want of it upon the rights of third persons not cognizant of the defect have been examined, and in which it has been held, that while the general rule was that want of jurisdiction rendered utterly void the process and proceedings of courts and officers, yet that third persons, whose duty it was to execute such process or give effect to such proceedings, could not be made trespassers by obeying such process, unless the want of it was apparent on the face of such process or proceedings; but that the officer or person who issued the void process, etc., was himself liable to the injured party for damages sustained.

In the case cited the company acted, and were compelled to act, upon the appraisal made by appraisers over whom or whose appointment they had no control, and hence it might be argued *Bigelow* in that case was brought within the principle which protects officers acting under like circumstances. But the non-liability of *Bigelow* was not put on any such ground. He was held not liable because the appointment of

the appraisers was a proceeding which could not be overhauled in a collateral proceeding, but must be, if at all, in one instituted directly for the purpose. The officer who executes process fair on its face, but issued in fact without jurisdiction, is protected, because it would be inequitable and unjust to hold him responsible for acts of others over whom he had no control, and for defects of which he had no notice. But Bigelow and those standing in his place are protected because the error complained of is such that it cannot be reviewed in an action to which he is a party.

In the case cited as well as in the one in hand the proceedings were special, and must conform to the requirements of the statute, or they will fail; and hence, if the appointment of a person not a freeholder would be fatal in the one case it should be in the other; and if the error was not available in the one it ought not to be in the other. The principle, upon which the rule applied in the case cited rests, would seem to be this: That when in special proceedings in courts or before officers of limited jurisdiction, they are required to ascertain a particular fact, or to appoint persons to act in such proceedings having particular qualifications, or occupying some peculiar relations to the parties or the subject-matter, such acts, when done, are in the nature of adjudications, which, if erroneous, must be corrected by a direct proceeding for that purpose; and if not so corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be.

There is a necessity for this doctrine, as without it it would be almost impossible ever to carry into effect special proceedings affecting property or persons.

The case under consideration affords a very striking illustration of the necessity of the principle for which I contend. The defendants were required to appoint freeholders only appraisers. This devolved on them the duty of ascertaining whether there were five freeholders in the corporation. To be freeholders they must own an estate in fee or for life. The five who were designated were found in possession of lands, and this possession is of itself evidence, in the absence of all other proof, of an ownership in fee: *Hill v. Draper*, 10 Barb. 458, and cases cited. Were they required to go further than this? If they had gone to the clerk's office and found a deed, it might have been proved to be a forgery, or although in form a deed, yet in equity it might be shown to be a mere mortgage. If the trustees must, at their peril, appoint men

who should be found to be freeholders after their titles had been litigated, or the proceedings were void, it would be a very hazardous business to be trustees of Medina, or in any other town where such qualifications were required for such officers. The legislature never intended to impose on the defendants any such hazards. It was their duty, acting in good faith, to appoint men who were, upon the evidence before them, freeholders. If they erred, the persons whose rights were affected by the error had the right to review the proceeding, and if the appraisers appointed were not freeholders they would be removed. But if the appointment was left in force, those appointed should forever thereafter be held to be freeholders for all the purposes of that proceeding.

The principle which I understand to govern this case was applied in *Betts v. Bagley*, 12 Pick. 572. That was an action on a judgment recovered in Massachusetts, to which a discharge under the two-third act of this state was pleaded. Amongst other grounds insisted upon to defeat the discharge was, that it was void for want of jurisdiction, it not being affirmatively proved that two thirds in amount of the insolvent's creditors had united with him in the petition. But the court held that "the officer acquired jurisdiction of the subject-matter when the proceedings were brought before him by a petition, purporting to be a petition by the insolvent in conjunction with persons holding two thirds of all the debts due from the insolvent to persons residing within the United States. I say with creditors purporting to hold two thirds; and it appears to me that this is all that can be required as preliminary proof, and in order to give jurisdiction, because, whether the debts are all really due and to the amount stated is one of the questions, and one of the most important questions, to be judicially inquired into and determined after the court has acquired jurisdiction." If this were not the rule, the officer who is obliged to act upon the papers presented could never know whether he acquired jurisdiction. If the creditors saw fit not to appear, these objections to the jurisdiction would not be known until an action was tried in which the validity of the discharge was tested and determined. The learned judge who delivered the opinion in *Betts v. Bagley*, 12 Pick. 572, assigns as a reason why a petition purporting to be signed by two thirds conferred jurisdiction, that the question whether that number did in fact sign was one of the questions to be tried on the hearing before the officer. That was doubtless a sufficient reason in that case.

but it seems to me that the principle which authorizes the court to hold that papers which purport to give jurisdiction do give it, may, with great propriety, be applied to other cases, and relieve the law from the reproach to which it is subject, of doing injustice to the innocent judge or officer who is in many cases compelled to act, and yet act at the risk of being subjected to damages for acting without jurisdiction, although he uses all reasonable precautions to protect himself and the injured party against such a result.

It was held in *Graves v. Otis*, 2 Hill, 466, that trustees of a village did not acquire jurisdiction to cut down a street when the petition, which the statute required to be signed by a majority of those liable to be assessed for the work, had been altered after it was signed by two of the signers, and made to embrace the sidewalk in question,—there not being a majority without the two who signed before the alteration. This alteration might or might not be such as to attract the attention of the trustees; and if it did, they had no means of ascertaining when it was made, except by calling upon each of those signing,—a duty which ought not to be imposed upon officers who act without compensation. It was said, if not decided, in *People v. Commissioners of Highways of Seward*, 27 Barb. 94, that commissioners of highways did not acquire jurisdiction to lay out a highway unless all of the twelve persons signing the petition were freeholders. In this case, again, the statute makes no provision by which the commissioners can ascertain whether the signers are or are not freeholders. The conveyance, if to any one or more of them, may not be on record; or if on record, may not in law and in fact convey a freehold estate. Is it just that commissioners should be required, at their peril, to ascertain the nature of the estate of each petitioner?

I have selected these cases from a multitude which might be cited to show the great injustice which the rigid doctrine applied in these cases produces to innocent parties. As the law was supposed to stand in this state before *Savacool v. Boughton*, 5 Wend. 180 [21 Am. Dec. 181], was decided, an officer was not protected by process fair on its face if the officer or court issuing it had not jurisdiction to issue it. The non-liability of the officer was asserted in that case upon the ground that it was unjust to hold him liable as a trespasser for doing what it was his duty to do, without knowing or having the means of knowing whether his process was or was not invalid. Now, the very same consideration should excuse the

commissioner of highways, or trustee of a village, when they are required to act upon evidence which they cannot be presumed to know is forged, and are without means of determining whether it is or not genuine.

If in such case there is a want of jurisdiction, the proceeding should be reversed or annulled. But the officer should not be held to be a trespasser, unless he knows or has reason to know that he is acting without jurisdiction. In other words, the proceedings are assailable for want of jurisdiction in a proceeding brought to review or reverse them, but are not assailable for want of jurisdiction, in an action against the officer, or other collateral proceeding.

The doctrine of *Betts v. Bagley*, 12 Pick. 572, comes directly to this result; and it seems to me that it can be productive of no harm, but on the contrary protects the public officer, and yet allows the injured party all the protection he can reasonably require.

The appointment of the assessors in this case was but one step in the proceedings to construct the sewer. The defendants have, by the charter, power without petition or other action of the citizens, to order sewers to be made, and of course to do whatever is reasonably necessary to effect that object. It was their duty to conform to the provisions of the charter in executing this power, and if they did not, the proceedings were voidable. But, although voidable, they were a protection to the defendants until reversed.

If I am right in supposing that the question whether the assessors were freeholders was one which the trustees had the right to decide, and that their decision on that subject cannot be reviewed collaterally, then the judgment of the general term should be reversed, and that of the county court and the justice affirmed, with costs.

The expenses of the survey and the fees of the assessors, which were added to the contract price of the sewer, were a part of the expense of the work, and were properly inserted in the warrant. The expense of constructing a sewer is not limited to the cost of excavation, building the walls, and covering them. Those liable should pay all the expenses actually and in good faith incurred by reason of the work, and which would not have been incurred had the work not been ordered. The items of expense objected to by the plaintiff's counsel seem to me to be entirely proper, and properly included in the warrant.

The judgment must be reversed, and a new trial ordered; costs to abide the event.

HOGEBROOM and SELDEN, JJ., expressed no opinion.

All the other judges being for reversal, judgment reversed.

ERRONEOUS JUDGMENTS MUST BE ATTACKED BY DIRECT PROCEEDINGS. They cannot be impeached collaterally: *Hampson v. Weare*, 66 Am. Dec. 116; *Phillips v. Coffee*, 63 Id. 357; *Nash v. Church*, 78 Id. 678, and note 685; *Coit v. Haven*, 79 Id. 244, and note 249; *Wimberly v. Hurst*, 83 Id. 295.

"SPECIAL CASES," WHAT ARE: *Parsons v. Tuolumne Co. Water Co.*, 63 Am. Dec. 76, and note 78.

OFFICERS WHO EXECUTE PROCESS FAIR ON ITS FACE, THOUGH ACTUALLY VOID, WILL BE PROTECTED: *Clarke v. May*, 61 Am. Dec. 470; *Sprague v. Birchard*, 60 Id. 393; *Dunlap v. Hunting*, 43 Id. 763, and note 765; *McDonald v. Wilkie*, 54 Id. 423; *Yeager v. Carpenter*, 31 Id. 665; but a ministerial officer is not protected in the execution of process regular upon its face if he have knowledge of facts rendering it void: See note to *McDonald v. Wilkie*, 54 Id. 427. Other cases, however, hold that the officer will not be protected in the execution of process regular on its face unless the court issuing it had jurisdiction: *Fisher v. McGirr*, 61 Id. 381; *Keniston v. Little*, 64 Id. 297, and note 300; *Wallace v. Holly*, 58 Id. 518; *Gurney v. Tufts*, 58 Id. 777; *Coleman v. McAnulty*, 57 Id. 229; *Emery v. Hapgood*, 66 Id. 459.

PERSON OR OFFICER ISSUING PROCESS WITHOUT JURISDICTION IS LIABLE AS TRESPASSER: *Clarke v. May*, 61 Am. Dec. 470, and note 473; *Adkins v. Brewer*, 15 Id. 264, and note 266; *Emery v. Hapgood*, 66 Id. 459; *Sprague v. Birchard*, 60 Id. 393.

COLLECTORS OF TAXES SURED FOR ACTS DONE BY VIRTUE OF WARRANTS issued to them need not prove the authority for making the assessment, nor show the regularity and legality of the proceedings antecedent to the issuing of the warrant: *Sprague v. Birchard*, 60 Am. Dec. 393.

JUSTIFICATION OF OFFICERS BY THEIR PROCESS: See extended note on the subject to *Savacool v. Boughton*, 21 Am. Dec. 190-209.

REGULARITY OF PROCESS CANNOT BE ATTACKED COLLATERALLY in an action against one acting under it: See cases cited in note to *Chapman v. Dyett*, 25 Am. Dec. 600.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: Proceedings of a court acting under a general jurisdiction, and partaking of the nature of an action, cannot be attacked collaterally: *Allen v. Utica etc. R. R. Co.*, 15 Hun, 82. Neither can an order made in supplementary proceedings by a judge who has acquired jurisdiction to make it: *Schrauth v. Dry Dock Savings Bank*, 8 Daly, 109. So while proceedings under process, void in fact as to the party, though fair on its face as to the officer serving it, are assailable for want of jurisdiction in a proceeding brought to review or reverse them, they cannot be attacked for want of jurisdiction in an action against the officer, or other collateral proceeding, where the court or officer has acted, though erroneously, in deciding upon matters before him for judicial determination: *Bulymore v. Cooper*, 2 Lana. 76. The rule is, that where general jurisdiction is given to a court over any subject, and that jurisdiction depends in the particular case upon facts which must

be brought before the court for its determination upon evidence, and where it is required to act upon such evidence, its decision upon the question of its jurisdiction is conclusive until reversed, revoked, or vacated, so far as to protect its officers and all other innocent persons who act upon the faith of it: *Roderigas v. East River S. Inst.*, 63 N. Y. 464; *Comstock v. Cranford*, 3 Wall. 405. With respect to proceedings in courts, or before officers of limited jurisdiction, as to the ascertainment of a particular fact, etc., the principal case was quoted from in *English v. Smock*, 34 Ind. 134, and summarized in *Roderigas v. East River S. Inst.*, 63 N. Y. 474. And compare *Comstock v. Cranford*, 3 Wall. 405. Determination in the nature of an adjudication can only be reviewed in a direct proceeding for that purpose. Thus the determination of the commissioners of highways that a highway is necessary will not be held invalid in a collateral proceeding because one of the persons certifying to its necessity was not a freeholder: *Ham v. Silvernail*, 7 Hun, 35; nor will the proceedings of a municipal corporation be held invalid in a collateral attack because one of the commissioners making a local assessment was not a freeholder, or because the work was given to a contractor without exacting a bond: *Thornton v. City of Elmira*, 10 Abb. Pr., N. S., 123.

MERRITT v. EARLE.

[29 NEW YORK, 115.]

COMMON CARRIER'S LIABILITY DOES NOT REST ON CONTRACT, BUT IS IMPOSED BY LAW. — Irrespective of any question of negligence or fault on his part, he is liable where the loss does not occur by the act of God or the public enemies.

COMMON CARRIER IS INSURER AGAINST ALL LOSSES except those occurring by the act of God or the public enemies.

BY "ACT OF GOD" IS MEANT WITHOUT AID OR INTERFERENCE OF MAN. — The expression excludes all human agency, and denotes accidents arising from winds, storms, lightning, tempest, etc.

EXPRESSIONS "ACT OF GOD" AND "INEVITABLE ACCIDENT" ARE NOT SYNONYMOUS. — That may be "an inevitable accident" which no foresight or precaution of the carrier can prevent.

ACT OF GOD, TO EXCUSE CARRIER, MUST BE SOLE AND IMMEDIATE CAUSE OF LOSS. — It is not enough that it may be the remote cause of the loss.

IMMEDIATE AND REMOTE CAUSES ILLUSTRATED BY FACTS. — Where horses have been lost by the sinking of a river steamboat carrying them, and it appears that the immediate cause of the accident and loss was the contact of the steamboat with the mast of a sloop which had been sunk, in a squall, two days before, which mast was out of water fifteen feet or more at low water, and was visible the day before and the same day of the accident, the loss cannot be attributed to "inevitable accident" or "act of God" as those terms are used in the law, but might have been avoided. The squall which sunk the sloop was but the remote or secondary cause of the accident, and could afford no shield to the carrier.

CONTRACT MADE ON SUNDAY IS NOT VOID, and does not violate the New York statute respecting the observance of the sabbath, unless it is to be performed on Sunday, in which case it would be invalid.

WHETHER CARRIER'S CONTRACT, WITH RESPECT TO STATUTE RELATING TO OBSERVANCE OF SUNDAY, IS GOOD OR BAD MAKES NO DIFFERENCE as to his liability for property placed in his custody for transportation, and which, through his negligence or violation of duty, has been lost.

ACTION against the defendant as the owner of the steamboat Knickerbocker, running on the Hudson River, to recover the value of a span of horses belonging to the plaintiff, which were lost while being transported from Albany to New York, by the sinking of the vessel in the Hudson River, under the circumstances stated in the opinion. The mast of the sunken sloop, at low-water mark, was fifteen or sixteen feet out of water, and was visible on the day before the steamer run upon it, and on the same day. A verdict in favor of the plaintiff was directed, and the defendant excepted. Judgment being entered, the defendant appealed to the supreme court, where the same was affirmed. He then appealed to this court. Other facts are stated in the opinion.

J. H. Reynolds, for the respondent.

By Court, **WRIGHT, J.** There was no controversy as to the nature of the accident, or how it occurred, which caused the loss of the plaintiff's horses. On the Friday preceding the downward trip of the defendant's steamer, a sloop had been sunk in a squall of wind, near Buttermilk Falls, and about in the usual route on the downward passage of steamboats navigating the river. The defendant's steamer ran upon the mast of this sunken vessel, which stove in her bottom, and she was cast away, and sunk in the water to her promenade deck in consequence. The defendant assumed this to be an inevitable accident, against which he could not have guarded by the exercise of due diligence and precaution; and as matter of law that it excused him from liability as a carrier. This presents one of the two questions raised by the exceptions in the case.

The law adjudges the carrier responsible, irrespective of any question of negligence or fault on his part, if the loss does not occur by the act of God or the public enemies. With these exceptions, the carrier is an insurer against all losses. The expressions "act of God" and "inevitable accident" have sometimes been used in a similar sense, and as equivalent terms. But there is a distinction. That may be an "inevitable accident" which no foresight or precaution of the carrier could prevent; but the phrase "act of God" denotes natural accidents that could not happen by the intervention of man,

as storms, lightning, and tempest. The expression excludes all human agency. In the case of *Trent Proprietors v. Wood*, 4 Doug. 287, Lord Mansfield said: "The general principle is clear. The act of God is natural necessity, as winds and storms, which arise from natural causes, and is distinct from inevitable 'accident.'" The same judge, in *Forward v. Pittard*, 1 Term Rep. 27, defined the "act of God" to be something in opposition to the act of man, adding "that the law presumes against the carrier, unless he shows it was done by such an act as could not happen by the intervention of man, as storms, lightning, and tempest."

Another principle running through the cases is, that to excuse the carrier the act of God must be the sole and immediate cause of the loss. That it is the remote cause is not enough. This is illustrated in the case of *Smith v. Shepherd*, reported in Abbott on Shipping, p. 883, and *McArthur v. Sears*, 21 Wend. 190. In neither of the cases was the loss occasioned directly by natural violence, although a sudden and extraordinary flood in the one case, and a light on board a steamer which had grounded in a previous gale of wind in the other, were the remote causes. In *Smith v. Shepherd*, *supra*, the vessel was lost by striking a floating mast attached to a vessel which had been sunk by getting on a bank that had suddenly and unexpectedly been made dangerous by an extraordinary flood. Coming in contact with the mast attached to the sunken ship, the defendant's vessel was forced by it upon the bank, altered suddenly by the flood, and was wrecked. The flood which changed the bank was the ultimate occasion of the misfortune; but it was held to be too remote. The vessel had not been forced on the bank by winds or other extraordinary violence of nature, or without human interference. The immediate cause of the loss was the coming in collision with a floating mast which some person had attached to the sunken vessel. In *McArthur v. Sears*, 21 Wend. 190, the vessel was lost in attempting to enter port by mistaking a light on board of a steamer, which had grounded in a previous gale of wind, for one of two beacon lights of the port. One of the beacon lights, through some neglect, was not burning, and the light on board of the wrecked steamer was easily mistaken for it. It was a dark night, the snow was falling, and there was a considerable wind. The mistake occasioned the loss of the vessel without any fault of her master or crew, yet it was held that the carrier was not excused.

In the present case the sinking of the defendant's vessel was not directly caused by the act of God. The immediate cause was her running upon the mast of a sloop that had been sunk in a squall of wind a day or two previously. She was not forced upon the mast which stove in her bottom by the wind or current, and although the sloop may have been sunk by the violence of the wind, yet that was but the remote cause of the loss of the defendant's steamer. The case of *Smith v. Shepherd, supra*, in its circumstances closely resembles the present one. In that case the defendant's vessel ran against a floating mast attached to a vessel which had been sunk by getting on a bank suddenly changed and made dangerous by a flood, and was forced by the mast upon the changed bank and wrecked. In this case the defendant's vessel ran against the mast of a sloop that had been sunk in a sudden and violent squall of wind. In the former case the changing of the bank was "the act of God" as spoken of in the law of carriers. So in this case the sinking of the sloop was occasioned by what may be properly called the "act of God." But neither the changing of the bank by the flood, nor the sinking of the sloop by the sudden and violent squall, was alone the cause of the loss of the defendant's vessel. Human agency intervened in the one case by attaching to the sunken vessel the floating mast with which the lost vessel came in contact; and in this other, by placing the sloop in the position in which she was overtaken by the wind. All the cases agree that by the expression "act of God" is meant something which operates without any aid or interference from man; and when the loss is occasioned or is the result in any degree of human aid or interference, the case does not fall within the exception to the carrier's liability. I am of the opinion, therefore, that had the defendant shown that the plaintiff's loss was occasioned by an accident against which he could not have guarded by the exercise of due diligence and precaution, it would not have absolved him from his responsibility as a carrier.

The horses were put on board the defendant's steamer for transportation on Sunday, the freight paid and a receipt taken. The defendant's second point was, that he was discharged from liability on the ground that the contract to carry the horses was in violation of the statute respecting the observance of Sunday: 1 R. S. 575, 676. There is no force in the suggestion. Even if the contract were for the performance

of servile labor, there was nothing in it which required the defendant to transport or commence the transportation on Sunday; and notwithstanding the horses were taken on board on Sunday, he was at liberty to detain the vessel at her dock until Monday morning. A contract made on Sunday is not void, and to invalidate a transaction under the statute, the contract must necessarily require the act to be performed on Sunday: *Boynston v. Page*, 13 Wend. 425; *Watts v. Van Ness*, 1 Hill, 76. However, if it was expected that the transaction was to begin on Sunday, it was not to be completed until Monday. But it is not material whether the contract made was good or bad; it was enough to entitle the plaintiff to recover, that the defendant, being a common carrier, had in his custody for transportation the plaintiff's property, and by his negligence or in violation of duty it was lost. This gave the plaintiff a right of action wholly disconnected from the statute relating to the observance of Sunday: *Allen v. Sewall*, 2 Wend. 338.

The judgment of the supreme court should be affirmed.

JOHNSON, J., delivered a concurring opinion.

Judgment affirmed.

CARRIER'S LIABILITY IS DETERMINED BY POLICY OF LAW, and he is liable independent of his contract: *Hollister v. Nowlan*, 32 Am. Dec. 455; and the liability of common carriers on our navigable streams is fixed by the common law: *Friend v. Woods*, 52 Id. 119. But whatever may have been the case in former times, it is now well established as a general rule, both in this country and in England, that a common carrier may by express agreement limit his common-law liability as an insurer of the property intrusted to him: See voluminous collection of cases cited in the note to *Cole v. Goodwin*, 32 Id. 497.

COMMON CARRIER IS INSURER AGAINST ALL LOSSES, except those occurring by the act of God or the public enemies: *Arnold v. Jones*, 82 Am. Dec. 617; collected cases in note to *Welsh v. Pittsburg etc. R. R. Co.*, 75 Id. 497.

"ACT OF GOD," WHAT IS: *Williams v. Grant*, 7 Am. Dec. 235; *New Brunswick etc. Trans. Co. v. Tiers*, 64 Id. 394; *Steele v. McTyer's Adm'r*, 70 Id. 516.

"INEVITABLE ACCIDENT," WHAT IS: Note to *Reaves v. Waterman*, 42 Am. Dec. 367; *Fish v. Chapman*, 46 Id. 393, and note 405. In the case last cited, "unavoidable" and "inevitable" are said to be in legal as well as common parlance synonymous.

EXPRESSIONS "ACT OF GOD" AND "INEVITABLE ACCIDENT" ARE GENERALLY HELD TO BE SYNONYMOUS: *Fish v. Chapman*, 46 Am. Dec. 393, and note 405; *Neal v. Saunderson*, 41 Id. 609; *Crosby v. Fitch*, 31 Id. 745; but every inevitable accident is not an act of God, though every act of God is an inevitable accident: *Fergusson v. Brent*, 71 Id. 582.

"ACT OF GOD," TO EXCUSE CARRIER, must be immediate or proximate cause of loss: *New Brunswick etc. Trans. Co. v. Tiers*, 64 Am. Dec. 394; and it must be a direct and violent act of nature: *Friend v. Woods*, 52 Id. 119.

DOCTRINE OF CAUSA PROXIMA NON REMOTA SPECTATUR DISCUSSED: *Scott v. Hunter*, 84 Am. Dec. 542.

CONTRACT MADE ON SUNDAY IS NOT VOID: *Kepler v. Keifer*, 31 Am. Dec. 460; *Lovejoy v. Whipple*, 46 Id. 157; unless prohibited by statute: See note to *Robeson v. French*, 45 Id. 237. But statutes for the observance of Sunday are remedial in their character, and should be liberally construed: *Smith v. Wilcox*, 82 Id. 302, and note 307.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: A common carrier's liability at common law extends to all losses not produced by the act of God or the public enemies: *Chamberlain v. Western Trans. Co.*, 45 Barb. 219. By the act of God is meant something which operates without any aid or interference from man: *Mynard v. Syracuse etc. R. R. Co.*, 71 N. Y. 187; *Worth v. Edmonds*, 52 Barb. 43; *Polack v. Ploche*, 35 Cal. 423. The elements are the means through which God acts, and "damages by the elements" are damages by the act of God: See case last cited. The freezing of a river or canal is such an act of God as excuses performance of a contract to transport thereon: *Worth v. Edmonds*, 52 Barb. 43. The mast of a sunken vessel is "a peril of the sea," but cannot be denominated the act of God: *Redpath v. Vaughan*, 52 Id. 499. The liability of a common carrier exists independent of any contract, express or implied; where the law imposes a duty upon any one, the neglect of that duty renders him liable to any person who has been injured through the neglect of it: *Lamb v. Camden etc. R. R. & Trans. Co.*, 2 Daly, 487. A common carrier may be relieved from a loss arising from any cause excepted either by the rules of law or the qualifications of the contract, but no further: *Simmons v. Law*, 3 Keyes, 220; S. C., 4 Abb. App. 245, to the same point. The fact that a contract for transportation was made on Sunday will not exempt carriers from liability for damages occasioned by their negligence: *Carroll v. Staten Island R. R. Co.*, 65 Barb. 42; *Sun Printing etc. Ass'n v. Tribune Ass'n*, 12 Jones & S. 141; *Platz v. City of Cohoes*, 89 N. Y. 224. The violation of a Sunday statute cannot be regarded as the immediate cause of the injury; see case last cited. On the two last points, however, respecting contracts violating a Sunday statute, and the effect thereof upon a carrier's liability for loss, legal notions are not all one way. In many cases the doctrine of *par delictum* has been applied. Thus, in a number of cases it was held in substance that the plaintiff, by the first wrong committed by him, had placed himself *in pari delicto* with the defendant with respect to the subsequent and distinct wrong committed by the latter; and the actions were dismissed upon the principle that the law will not permit a party to prove his own illegal acts in order to establish his case: See cases cited in *Sutton v. Town of Wauwatosa*, 29 Wis. 25; *Platz v. City of Cohoes*, 89 N. Y. 224; *Carroll v. Staten Island R. R. Co.*, 65 Barb. 42.

TILLEY v. HUDSON RIVER RAILROAD COMPANY.

[29 NEW YORK, 252.]

DAMAGES ARISING FROM DEATH OF WIFE AND MOTHER. — In an action by a father as administrator of his wife, who was killed by defendants' negligence, the jury may, in estimating the pecuniary injury, take into consideration the nurture, instruction, and physical, moral, and intellectual training which the mother gave to her children.

FACT OF PECUNIARY LOSS, AND AMOUNT THEREOF, ARE LEFT TO BE DETERMINED BY JURY under instruction that they may, in estimating the pecuniary injury in an action by a father, as administrator of his wife, to recover damages for his wife's death, caused by defendants' negligence, take into consideration maternal culture and education as damages; because such instruction does not imply that the children are necessarily and inevitably subjected to such a loss.

PECUNIARY DAMAGES ARE NOT RESTRICTED TO MINORITY OF CHILDREN. —

In an action by a father, as administrator of his wife, to recover damages for his wife's death, caused by defendants' negligence, there is no sufficient legal reason for limiting the pecuniary damages caused by want of maternal culture and education, to the minority of the children, if the jury are legally persuaded that they will continue after that age.

PROSPECTIVE DAMAGES ARE ALLOWABLE IN ESTIMATING PECUNIARY INJURIES. —

While the jury, in an action by a father, as administrator of his wife, who was killed by defendants' negligence, must assess the damages with reference to the pecuniary injuries sustained by the next of kin in consequence of the mother's death, they are not limited to the losses actually sustained at the precise period of her death, but may include, also, prospective losses, provided they are such as the jury believe, from the evidence, will actually result to the next of kin as the proximate damages arising from the wrongful death.

BUSINESS CAPACITY OF MOTHER ADMISSIBLE IN ESTIMATING PECUNIARY DAMAGES. —

In an action by a father, as administrator of his wife, who was killed by defendants' negligence, evidence in relation to the capacity of the mother to conduct business and make money is proper, as aiding the jury in arriving at a correct result in regard to the pecuniary benefit which the mother was to her children, and her capacity to bestow such training, instruction, and education as would be pecuniarily serviceable to the children in after life.

ACTION by the plaintiff, as administrator of his wife, to recover damages sustained by her death from injuries alleged to have been caused by the negligence of the defendants. The cause was tried twice. The judgment rendered in favor of the plaintiff on the first trial was reversed by this court, and a new trial ordered: See 24 N. Y. 471. A second trial resulted in a verdict for the plaintiff. That the death of the plaintiff's intestate was caused by the negligence of the defendants, no question was made. The only questions raised by the defendants related to the rule of damages. The injury which caused the death happened by a collision of trains on the defendants' road, in one of which the deceased was a passenger. It appeared that prior to her death the plaintiff, who was a carpenter by trade, resided with his wife and family in the town of Grafton; that the deceased, at the time of her death, was forty-eight years of age, and the plaintiff about fifty; that there were five children, the oldest twenty-three and married, the next twenty-one, one seventeen, one eleven, and the other nine

years of age. Defendants excepted to the admission of evidence as to plaintiff's occupation. The plaintiff was also allowed to show, against defendants' objection and exception, that the deceased carried on the shirt and bosom business; that she also attended to her household affairs; that she instructed her children and sent them to school; that she instructed them in domestic affairs, and nursed them in sickness; and that she was a member of the Baptist Church, the superintendent of a Sunday school, a frequent participator in the exercises of the church, and an exhorter at meetings. The nature of the charges given and refused appear in the opinion. The judge refused to charge that no damages could be given for any loss sustained by Mrs. Burdick, one of the children, who was of age before the mother died. Verdict for plaintiff for five thousand dollars.

John H. Reynolds, for the appellants.

D. S. Seymour, for the respondent.

By Court, HOGEBOM, J. Whatever may be said of the precise points in judgment when this case was here upon a former occasion, it is plain that the judge on the second trial charged the jury in conformity with the views presented in the prevailing opinion on the former appeal. Those views are supposed to have received the concurrence and approval of a majority of the court, and at all events to have suggested themselves to the court as probably sound, whether or not they were entitled to absolute authority in controlling the proceedings on the second trial. It is not, perhaps, well to be unduly critical in concluding the parties by the former decision. The questions now arise and call for direct and precise adjudication; and as they have been fully, ably, and learnedly discussed, perhaps no more fit occasion will be presented for a judicial exposition of the statute under which these proceedings were had, so far as the same remains open for examination.

Although the briefs now presented are somewhat voluminous, the points are few, and are confined to exceptions to a single species of evidence, and to exceptions to the charge and refusals to charge. They may be ranged under the following heads: 1. Exceptions to the charge that the jury might take into consideration the nurture, instruction, and physical, moral, and intellectual training which the mother gave to the children; 2. Exceptions to the refusal of the judge to restrict

the damages to the minority of the children; 3. Exceptions to the charge that prospective damages were allowable; 4. Exceptions to the evidence of the business capacity of the mother.

The charge of the judge was explicit that the damages must be limited to pecuniary injuries; and he said that in estimating them they had a right to consider the loss (that is, the pecuniary loss) which the children had sustained in reference to their mother's nurture and instruction, and moral, physical, and intellectual training. I think this does not imply that the children are necessarily and inevitably subjected to such a loss, but leaves it to the jury to determine whether any such loss has been in fact sustained, and if so, the amount of such loss. This is the fair scope and meaning of the charge, and if it was not sufficiently explicit should have been made so by a direct request for such purpose. Thus understood, I regard it as unexceptionable. It is certainly possible, and not only so, but highly probable, that a mother's nurture, instruction, and training, if judiciously administered, will operate favorably upon the worldly prospects and pecuniary interests of the child.

The object of such training and education is not simply to prepare them for another world, but to act well their part in this, and to promote their temporal welfare. If they acquire health, knowledge, a sound bodily constitution, and ample intellectual development under the judicious training and discipline of a competent and careful mother, it is very likely to tell favorably upon their pecuniary interests. These are better, even in a pecuniary or mercenary point of view, than a feeble constitution, impaired health, intellectual ignorance and degradation, and moral turpitude. To sustain the charge, it is enough that these circumstances might affect their pecuniary prospects. It was left to the jury to say whether, in the given case, they did so or not, and if so, to what extent. It is no answer to this view to say that wealth is sometimes associated with infirm health, mental degradation, and moral turpitude. Cases of this kind do occur, but they do not make the rule, nor tend to show that the healthy growth and expansion of the physical, intellectual, and moral powers with which a kind Providence has endowed us do not tend to our worldly advantage. I do not understand from the phraseology of the statute, that an extremely nice and contracted interpretation should be put upon the term "pecuniary injuries." A liberal scope was designedly left for the action of the jury. They are

to give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death. They are not tied down to any precise rule. Within the limit of the statute as to amount, and the species of injury sustained, the matter is to be submitted to their sound judgment and sense of justice. They must be satisfied that pecuniary injuries resulted. If so satisfied, they are at liberty to allow them from whatever source they actually proceeded which could produce them. If they are satisfied from the history of the family, or the intrinsic probabilities of the case, that they were sustained by the loss of bodily care or intellectual culture or moral training which the mother had before supplied, they are at liberty to allow for it. The statute has set no bounds to the sources of these pecuniary injuries. If the rule is a dangerous one, and liable to abuse, the legislature, and not the courts, must apply the corrective.

The charge is supposed to have been particularly objectionable because it set before the jury moral training and culture as one of the sources of pecuniary benefit, which the jury were at liberty to consider. It would be an effectual though technical answer to this exception to say that the charge was not objected to specifically on that ground, and that if the charge is sustainable on the score of physical and mental training supplied by the mother, it cannot be rejected as erroneous, because in the same sentence moral culture was included without a specific objection. But I think it defensible on the grounds already advanced, that moral culture, like bodily health and mental development, improve and perfect the man, and fit him, not only for a more useful but a more prosperous career, for worldly success as well as social consideration. It is not essential to show that they necessarily result in direct pecuniary advantage; it is sufficient that they may do so; that they often do so; that it is possible and not improbable that such may be the result, and that therefore these items may be set forth and presented for the consideration and deliberation of the jury, to be disposed of as they shall deem to be just. I think the exception is not well taken, if they may possibly result in pecuniary benefit, and do not tend in a contrary direction. I concede these are quite general, and to some extent loose and indefinite elements to enter into a safe and judicious estimate of actual pecuniary damage, but I am unable to find in the statute a restriction which shall confine it within narrower limits.

Nor do I perceive any sufficient legal reason for limiting the damages to the minority of the children, if the jury are legally persuaded they would continue after that age. It cannot be denied that the deprivation of parental instruction and training and discipline, after that age, is more or less detrimental to the child in a pecuniary point of view, and I see no arbitrary injunction in the statute peremptorily to exclude such considerations from the jury. The judge seems to have submitted this part of the case to the jury with cautious directions. He instructed the jury that if they could, under evidence, fairly conclude that the children, at any age, would receive pecuniary benefit from the instructions and counsel of the mother, they were entitled to allow for it such damages as would naturally and proximately result. The judge further charged that beyond the age of twenty-one years, the jury must proceed with caution, and allow only those damages which, under the evidence, they should find would and did reasonably and proximately result from the death of the mother by the wrongful act of the defendants. He further stated to the jury that he did not charge that the jury must allow for damages beyond twenty-one years. Assuming, as I think we must, that there is not, either in the statute or in principle, any peremptory injunction to confine the damages absolutely to the minority of the children, the case seems to have been put to the jury on this point with proper limitations.

Nor do I think it was erroneous to instruct the jury that while they must assess the damages with reference to the pecuniary injuries sustained by the next of kin in consequence of the death of Mrs. Tilley, they were not limited to the losses actually sustained at the precise period of her death, but might include also prospective losses, provided they were such as the jury believed from the evidence would actually result to the next of kin as the proximate damages arising from the wrongful death.

If damages of the character alluded to, to wit, those arising from the deprivation of the training and education which the parent would bestow were allowable at all, the loss which the children would sustain by the death must necessarily be such as should arise from the nurture and training to be subsequently bestowed. That which had been already given, and of which the children had already reaped the benefit, could not be increased by the continued life of the parent, nor cur-

tailed by her sudden death. The result had been already realized. But her sudden and wrongful removal was the withdrawal—the permanent and perpetual withdrawal—of a moral and intellectual fund from which the children were constantly deriving pecuniary aliment and support. And it is this withdrawal which formed the basis of the whole allowance for any damage arising from this source. The length of time such benefit would have been enjoyed was left to the jury, under proper instructions. They were charged to find it from the evidence; they were charged to limit the recovery to such damages as would actually result, and to such damages as were proximate and not remote.

The only remaining question concerns the admission of evidence in relation to the capacity of the mother to conduct business and make money.

If the results already announced rest on a sound foundation, then this evidence was proper, as aiding the jury in arriving at a proper result in regard to the pecuniary benefit which the mother was to her children, and the capacity of the mother to bestow such training, instruction, and education as would be pecuniarily serviceable to the children in after life. It is not denied that if the mother had, by her industry and business capacity, acquired a certain pecuniary capital, the amount of it would be proper to be proved. Would it be improper to show that it was likely to be increased by her industry, her economy, her capacity for business, and her judicious conduct of business affairs? All these are elements of pecuniary success,—component parts, in fact, of that pecuniary capital, of the continued exercise and employment of which the children were entitled to the benefit, and of which the wrongful act of the defendants deprived them. This was evidence, moreover, of the circumstances, situation, engagements, and surroundings of the family, which seem on general principles always proper to give with a view of daguerreotyping to the jury the actual condition of affairs, which it is so important for them to understand, the extent and details of which must generally be left to the sound discretion of the trial judge. It contains no positive illegal element, and may often be of essential service in giving to the jury a practical view of the case.

Most of the views here presented are discussed and elaborated in the opinion pronounced when the case was here on a former occasion: *Tilley v. Hudson R. R. R. Co.*, 24 N. Y. 473—

477; and their pertinency sustained by considerations more direct and practical than those which are here urged. I refer to them for additional light on this subject. My object here has been mainly to present some general additional views which might possibly aid in a proper interpretation of the statute in question.

I think no error was committed at the trial, and that the judgment of the supreme court should be affirmed.

WRIGHT, MULLIN, INGRAHAM, DAVIES, JJ., and DANNO, C. J., were also in favor of affirmance.

JOHNSON, J., was also for affirmance, on the authority of the former decision in this case; but if the question was open he would agree with SELDEN, J., who read an opinion for reversal and a new trial.

Judgment affirmed.

ACTIONS FOR INJURIES CAUSING DEATH TO WIFE OR RELATIVES: See note to *Long v. Morrison*, 77 Am. Dec. 77; *Chicago v. Major*, 68 Id. 553; *Carey v. Berkshire R. R. Co.*, 48 Id. 616, and extended note thereto on the subject 632-641.

DAMAGES FOR CAUSING DEATH: See notes to *Chicago v. Major*, 68 Am. Dec. 559; *Carey v. Berkshire R. R. Co.*, 48 Id. 637, showing that they are restricted to pecuniary loss.

THE PRINCIPAL CASE WAS CITED in the following authorities and to the point stated: In actions under the statute for injuries causing death, juries are not held to any fixed and precise rules in estimating the damages. If the injuries are pecuniary, they may be compensated, from whatever source they proceed: *Evans v. Chicago etc. R'y Co.*, 38 Wis. 635; *Lockwood v. New York etc. R. R. Co.*, 98 N. Y. 526. And in estimating the pecuniary injury, the jury may, in a proper case, where there is evidence authorizing them to consider the subject, take into consideration the support of the widow of the deceased and the minor children, and the instruction, and physical, moral, and intellectual training of the minor children by the deceased: *Illinois Cent. R. R. Co. v. Weldon*, 52 Ill. 294. The weight of authority, however, is that the jury may take into account the reasonable expectation of pecuniary benefit from the continuance of life beyond minority. Yet the jury are not to take it for granted without evidence, or to guess at it. They are to find such benefit, and the extent of it, from the evidence, and are limited to such proximate damages as will actually result: *Potter v. Chicago etc. R'y Co.*, 21 Wis. 376; *Houghkirk v. President etc. of D. & H. Canal Co.*, 92 N. Y. 225. Human lives are not all of the same value to the survivors, and the damages to the next of kin are necessarily indefinite, prospective, and contingent. They cannot be proved with even an approach to accuracy, and yet they are to be estimated and awarded, for the statute has so commanded. But even in such a case there is, and must be, some basis in the proof for the estimate. The age, sex, general health, and intelligence of the person killed, and the situation and condition of the survivors, and their relation to the deceased, are

elements which furnish some basis for judgment. That it is slender is true; but it is all that is possible, and while that should be given, more cannot be required: See case last cited; *Lockwood v. New York etc. R. R. Co.*, 98 N. Y. 528. To entitle the plaintiff to recover in such actions, under the statute, it is not indispensable that the deceased should leave him surviving "a widow and next of kin": *McMahon v. Mayor etc.*, 33 Id. 647. The directions in *McIntyre v. New York Cent. R. R. Co.*, 85 How. Pr. 45, S. C., 37 N. Y. 289, and *Dickens v. New York Cent. R. R. Co.*, 1 Abb. App. 507, were in strict accordance with the doctrines laid down in the principal case.

REED v. RANDALL.

[29 NEW YORK, 322.]

IN EXECUTORY CONTRACT FOR SALE OF PERSONAL PROPERTY, law implies that the article when furnished shall be of merchantable quality, and this without express words between the parties.

TORACCO IS NOT MERCHANTABLE where it is not well cured and in good condition when it is delivered, but is wet, sweaty, and rotten.

SUPERADDING TO TERMS OF CONTRACT WORDS EXPRESSING OBLIGATION WHICH LAW IMPLIES does not change the nature or extent of the obligation or the remedy upon it.

BREACH OF CONTRACT TO FURNISH IN FUTURE MERCHANTABLE CROP OF TORACCO, by delivering tobacco that is wet, sweaty, and rotten, is not a breach of warranty, but a mere non-compliance with such executory contract.

UNLESS VENDER GIVES NOTICE OR OFFERS TO RETURN PERSONAL PROPERTY, his remedy to recover damages on the ground that the article furnished does not correspond with the contract, where it is executory, does not survive his acceptance of the property after opportunity to ascertain the defect.

RETENTION OF PROPERTY DELIVERED UNDER EXECUTORY CONTRACT is an admission that the contract has been performed.

VENDER IS NOT BOUND TO RECEIVE AND PAY FOR PROPERTY THAT HE HAS NOT AGREED TO PURCHASE; but if after delivery it is found on examination to be unsound, or not to answer the order given for it, he must immediately return it to the vendor, or give him notice to take it back, or he will be presumed to have acquiesced in its quality.

VENDER CANNOT ACCEPT DELIVERY OF PROPERTY UNDER EXECUTORY CONTRACT, retain it after having had an opportunity of ascertaining its quality, and recover damages if it be not of the quality or description called for by the contract.

PART DELIVERY. — If VENDER, ON RECEIVING PART OF QUANTITY OF GOODS SOLD, finds they are not of the kind or quality which his contract entitles him to, he is not at liberty to retain such part, and claim damages for the non-delivery of the entire quantity. Nor can he require the delivery of the residue, retaining a claim for damages. He must either receive the article as it is, or he must return the portion delivered, and then enforce his claim for damages. He can recover no damages if he refuse to return the part delivered.

VENDOR, HAVING WITHOUT PROTEST ACCEPTED TOBACCO BOUGHT UNDER EXECUTORY CONTRACT, cannot, after waiting for more than a year and a half after its delivery, maintain an action to recover damages on the ground that the tobacco was in a bad condition when delivered, not having been properly cured, and being wet, sweaty, and rotten.

ACTION for breach of contract under circumstances stated in the opinion. Defendant's counsel objected to the sufficiency of the complaint to maintain the action, for the reason that it did not appear that the plaintiffs, on discovering the condition of the tobacco, had offered to return it or notified the defendant of its condition. He therefore moved for a nonsuit. Plaintiffs' counsel insisted that it was not necessary to show such notification or to return, or offer to return, the tobacco, to entitle the plaintiffs to their action for the breach of contract as claimed in their complaint. It was admitted that they had not returned the tobacco, or offered to return it, or had notified the defendant of its condition. A nonsuit was granted, plaintiffs' counsel excepted, judgment dismissing the complaint being entered, with costs against the plaintiffs, an appeal was brought therefrom to the general term of the supreme court, where the same was affirmed. The plaintiffs then appealed to this court.

By Court, WRIGHT, J. The action was for the breach of a contract to sell and deliver a crop of tobacco growing on the land of the defendant. In September, 1856, the parties contracted for the sale of the crop. The plaintiffs agreed to pay ten cents per pound on the delivery thereof, well cured and boxed and in good condition; and the defendant agreed to sell and make such delivery in the early part of May, 1857, at such place in the city of Syracuse as the plaintiffs should thereafter designate. The contract therefore was executory. In the early part of April, 1857, the plaintiffs notified the defendant to deliver the tobacco at the storehouse of Greenman & Co., in Syracuse. On the 20th of April, 1857, the defendant delivered the same at the place designated, and it was received and accepted by the plaintiffs. The breach alleged relates to the quality and condition of the tobacco at the time it was delivered and the contract of sale executed. It is averred to have been in bad condition, not having been properly cured, and being wet, sweaty, and rotten. The tobacco was accepted in execution of the contract, and retained without notifying the defendant of its defects, after discovering them, or returning or offering to return it, or making any request to take it

back. The plaintiffs converted the property, and some seventeen months after delivery and acceptance bring their action to recover damages resulting from its being improperly cured and being in bad condition when delivered. The question is, whether the action is maintainable. The learned judge, at the trial, thought it was not, and nonsuited the plaintiffs; and the supreme court, on appeal, concurred with him in opinion.

This conclusion, I think, was right. It is not claimed to be otherwise, unless there was a warranty that the tobacco, when delivered, should be well cured and in good condition. But the stipulation in respect to the quality and condition of the article when delivered constituted no express warranty. The contract was executory, for the sale of a growing crop of tobacco, to be delivered the spring following, well cured and in good condition. The article bargained for and to be furnished in the future was a merchantable crop of tobacco. This was what the vendor agreed to sell and the vendee to purchase.

It was the sale of a particular thing by its proper description merely; and the descriptive words used for defining the thing agreed to be sold were of the substance of the contract, not collateral to the main object of it. The breach alleged was, that the tobacco was not, when delivered, well cured and in good condition, but on the contrary was in bad condition, and was wet, sweaty, and rotten; that is, it was an inferior, unmerchantable commodity. In an executory contract for the sale of personal property, the law implies that the article, when furnished, shall be of merchantable quality: *Hargous v. Stone*, 5 N. Y. 73, and cases cited. And if the tobacco, when delivered, was not well cured and in good condition, but was wet, sweaty, and rotten, it was not merchantable: *Hamilton v. Ganyard*, 34 Barb. 204. In legal effect, therefore, the agreement as to which the breach was alleged was the same as the law would imply in the absence of words of express contract. It would be established upon proof of a contract to sell and deliver the tobacco at a future time, and without proof of express words between the parties; and if express words were used between the parties, yet superadding to the terms of a contract words expressing an obligation which the law implies does not change the nature or extent of the obligation or the remedy upon it: *Sprague v. Blake*, 20 Wend. 64.

A warranty, then, cannot be predicated upon the contract alleged in the complaint; and the rules of law by which the rights of the parties in respect to warranties are regulated are

inapplicable. A breach of the contract was not a breach of warranty, but a mere non-compliance with the contract that the defendant had agreed to fulfill.

In cases of executory contracts for the sale and delivery of personal property, the remedy of the vendee to recover damages, on the ground that the article furnished does not correspond with the contract, does not survive the acceptance of the property by the vendee after opportunity to ascertain the defect, unless notice has been given to the vendor, or the vendee offers to return the property. The retention of the property by the vendee is an assent on his part that the contract has been performed. The delivery of property corresponding with the contract is a condition precedent to the vesting of the title in the vendee. The parties understand that the vendee is not bound to accept the property tendered, except upon this condition. This the vendee is to determine upon the receipt of the property. There is no intention that a defective article should be accepted, and that the vendee should rely upon the covenant for his indemnity. The latter is not bound to receive and pay for a thing that he has not agreed to purchase; but if the thing purchased is found on examination to be unsound, or not to answer the order given for it, he must immediately return it to the vendor, or give him notice to take it back, and thereby rescind the contract, or he will be presumed to have acquiesced in its quality. He cannot accept the delivery of the property under the contract, retain it after an opportunity of ascertaining its quality, and recover damages if it be not of the quality or description called for by such contract. It is understood of every contract for the future sale and delivery of an article of merchandise, even without express terms, that it shall be of merchantable quality; and I am not aware that it has ever been doubted that, upon the delivery of property pursuant to such a contract, the vendee, by retaining the property without notice to the vendor, waives all remedy upon the contract for any breach of an obligation implied by law.

The principle, that when the contract of sale is executory the remedy of the purchaser to recover damages, on the ground that the article furnished does not correspond with the contract, will not survive an acceptance and retention of the property, after opportunity to ascertain the defect, without notifying the vendor, is well supported by authority. In *Fisher v. Samuda*, 1 Camp. 190, the declaration stated that

in consideration that the plaintiff had undertaken to buy of the defendants a certain quantity of beer, to be shipped to Gibraltar, they undertook to furnish and deliver to him good and sufficient beer for that purpose. The breach alleged was, that the beer furnished and delivered was bad, and unfit to be shipped to Gibraltar, etc. The proof was, that the beer was delivered in May, to be shipped to Gibraltar the following autumn, and in July it was discovered to be of bad quality, and unfit for the purpose intended. The earliest notice given to the defendants was in December. Lord Ellenborough held that, "under these circumstances [retaining the beer so long without notice], the plaintiff must be presumed to have assented to its being of good quality, and to have acquiesced in the due performance of the contract on the part of the defendants." In *Grimaldi v. White*, 4 Esp. 95, the defendant contracted with the plaintiff for pictures at certain prices, pursuant to specimens exhibited. The pictures had been sent to the defendants, who, at the time of delivery, had objected to the execution as being inferior to the specimens exhibited; but he did not return them. In *assumpsit* to recover the contract price of the paintings, the defense intended to be relied on was, the inferiority of the execution, and of course, of value; and the defendant was proceeding to call witnesses to ascertain what was the real value, but on objection the evidence was excluded. Lawrence, J., said: "The defendant relies on the circumstance that they [the pictures] are of an execution very inferior to the specimens exhibited, and which the plaintiff undertook to paint conformable thereto. When an artist exhibits specimens of his art and skill as a painter, and affixes a certain price to them, if a person is induced to order a picture from an approbation of such specimens, and the execution of it, when delivered, is inferior to the specimen exhibited, he has a right to refuse to receive it, or return it, as not being conformable to that performance which the painter undertook to execute; but if he means to avail himself of that objection, he must return the picture, — he must rescind the contract totally. Having received it under a specific contract, he must either abide by it or rescind it *in toto*, by returning the thing sold; but he cannot keep the article received under such a specific contract, and for a certain price, and pay for it at a less price than that charged by the contract."

In *Milner v. Tucker*, 1 Car. & P. 15, a person contracted to supply a chandelier sufficient to light a certain room. The

purchaser kept the chandelier six months, and then returned it. He was held liable to pay for it, although it was not according to the contract. In *Sprague v. Blake*, 20 Wend. 61, the action was *assumpsit* for wheat sold and delivered. The proof was, that the defendant had agreed to purchase the whole of a crop of wheat belonging to the plaintiff, estimated to amount to between three hundred and four hundred bushels, to be delivered at a place on Seneca Lake, for which the defendant agreed to pay one dollar per bushel. By the terms of the agreement the wheat was to be merchantable. Subsequently, a part of the wheat was delivered at the place specified, and received by the defendant; and an arrangement was then made between the parties that the residue of the crop should be delivered at the storehouse of one Morgan, in Penn Yan. In pursuance of this arrangement, the plaintiff delivered at Morgan's storehouse about twenty-eight bushels of the wheat, and for the delivery of this parcel the action was brought, the defendant refusing to pay for the same. It was proved that Morgan was the agent of the defendant in receiving wheat, and that the wheat in question, together with other wheat, was taken away from his storehouse by the defendant's boatmen. The defendant attempted to set up the inferior quality of the wheat, and offered to prove its real value, with the view of recouping damages for a breach of the contract, but the evidence was rejected. The court charged the jury that if they were satisfied the wheat was received by the defendant or his agent, they would find for the full contract price. The plaintiff had a verdict for the whole contract price, and on error to the supreme court the judgment was affirmed. The supreme court cite approvingly the case of *Fisher v. Samuda*, 1 Camp. 190, and lay down the doctrine that although by the terms of a contract an article agreed to be delivered is to be of a merchantable quality, still, if an inferior article be delivered and accepted, the purchaser, when called upon for payment, is not entitled to a reduction from the contract price on the ground of the inferior quality of the article. He must refuse to accept it, or if its inferiority be subsequently discovered he must return it or require the purchaser to take it back. In *Hargous v. Stone*, 5 N. Y. 73, it was held that if the contract was an executory one, to furnish goods of a particular description, the purchaser was bound to examine them when received and opened, and to have returned them if the quality was not such as was promised. Not having

done so, he waived all objections on account of defects of quality. In *Shields v. Pettee*, 2 Sand. 262, it was held that on a sale of goods, if the buyer, on receiving a part of the quantity sold, finds they are not of the kind or quality which his contract entitles him to, he is not at liberty to retain such part, and claim damages for the non-delivery of the entire quantity. Nor can he require the delivery of the residue, retaining a claim for damages. He must either receive the article as it is, or he must return the portion delivered, and then enforce his claim for damages. He can recover no damages if he refuse to return the part delivered: See also *Howard v. Hoey*, 23 Wend. 350; *Hopkins v. Appleby*, 1 Stark. 477; 2 Kent's Com. 480; Parsons on Contracts, 475.

The case of *Hopkins v. Appleby*, 1 Stark. 477, was this: The defendants, soap-makers in Bath, ordered of the plaintiffs in London eight sarrands of Spanish barilla and four sarrands of salt barilla, which the plaintiffs warranted to be of the best quality. The order was given in October, and the barilla reached its destination in December. The defendants proceeded to use it, when it was discovered that the Spanish barilla was of inferior quality. They continued, however, to use it without complaint, and made no remonstrance until it had been wholly consumed. In *assumpsit* to recover the price, the defense was interposed that the quality was not as contracted for, and that the defendants had paid into court as much as the barilla was worth. The plaintiffs had a verdict. Lord Ellenborough said: "When an objection is made to an article of sale, common justice and honesty require that it should be returned at the earliest period, and before the commodity has been so changed as to render it impossible to ascertain by proper tests whether it is of the quality contracted for. . . . It was incumbent on the defendants to give the seller an opportunity of establishing his case by the opinion of intelligent men on the subject, and not throw a veil of obscurity over it, and debar the party from the fair means of ascertaining the quality. . . . The party who extinguishes the light, and precludes the other party from ascertaining the truth, ought to bear the loss." These considerations apply with great force in the present case. The tobacco was delivered to the plaintiffs and accepted by them in April, 1857, and the first notice to the vendor of any defect was when the suit was commenced in September, 1858. The plaintiffs deprived the defendant of all opportunity to ascertain or establish the actual condition of

the tobacco at the time of delivery. Tobacco is an article ordinarily the subject of immediate sale and consumption, and no opportunity was given to the vendor to test the claim of the plaintiffs by examination. The defendant had a right to suppose, from the silence of the plaintiffs, that they assented to the quality of the tobacco, and that it corresponded with the contract. The judgment of the supreme court should be affirmed.

HOGEBROOM, J., filed a dissenting opinion.

MULLIN, J., concurred with HOGEBROOM, J.

All the other judges being for affirmance, judgment affirmed.

IN EXECUTORY CONTRACT FOR SALE OF PERSONAL PROPERTY LAW IMPLIES THAT ARTICLE, WHEN FURNISHED, SHALL BE MERCHANTABLE: *Howard v. Hoey*, 35 Am. Dec. 572, and note 575; note to *Brantley v. Thomas*, 73 Id. 268; note to *Getty v. Rountree*, 54 Id. 146; *Babcock v. Trice*, 68 Id. 560; and extended note to *Scott v. Hix*, 62 Id. 460, showing the distinction taken between executory contracts and present executed contracts, as to the extent of warranty.

DUTY OF PURCHASER, UNDER EXECUTORY CONTRACT, AS TO NOTICE AND RETURN OF ARTICLES which, when received, are not merchantable, and where the vendee wishes to rescind: See *Howard v. Hoey*, 35 Am. Dec. 572, and note 575, in which several points of the *syllabus, supra*, are treated. See also *Hoadley v. House*, 76 Id. 167, and extended note to *Bryant v. Isburgh*, 74 Id. 657-662, on rescission of contracts generally.

THE PRINCIPAL CASE has been repeatedly commented upon and explained: See *Nichols v. Townsend*, 7 Hun, 378; *Woodruff v. Peterson*, 51 Barb. 255, 256; *Harris v. Rathbun*, 2 Keyes, 315, 319; *Day v. Pool*, 63 Barb. 514, 518-523; *Wells v. Schwood*, 61 Id. 244, 248; *Brown v. Burhaus*, 4 Hun, 230; and has been cited in the following authorities to the point stated: Where in an executory contract for the purchase and sale of personal property, there is no warranty, express or implied, an acceptance by the vendee after examination, or after opportunity for an examination, in the absence of fraud, is, as a general rule, conclusive of an assent on his part that the contract has been complied with, and that the property is of the quality contracted for, and precludes a recovery for any defects which may exist: *Dutchess Co. v. Harding*, 49 N. Y. 324; *Normington v. Cook*, 2 Thomp. & C. 424; *Gurney v. Atlantic etc. R'y Co.*, 2 Id. 451; S. C., 58 N. Y. 364, to the same point; *Stafford v. Pooler*, 67 Barb. 147; *Charlotte etc. R. R. Co. v. Jesup*, 44 How. Pr. 448; *Greenthal v. Schneider*, 52 Id. 134; *Neafie v. Hart*, 4 Lans. 5, 7; *McCormick v. Sarson*, 45 N. Y. 268; *Beck v. Sheldon*, 48 Id. 373; *Woodruff v. Peterson*, 51 Barb. 255; *Leavenworth v. Packer*, 52 Id. 135. The vendee must immediately, or at least within a reasonable time, rescind the contract by giving notice of defects, and returning or offering to return the goods. He cannot retain the property, and afterward claim damages by action or recoupment for inferior quality. A use and conversion of the property without notice of defects is a legal waiver of all objections, and estops any claim for damages: *Harris v. Rathbun*, 2 Keyes, 315; *Gurney v. Atlantic etc. R'y Co.*, 58 N. Y.

384; S. C., 2 Thomp. & C. 451; *City of Memphis v. Brown*, 20 Wall. 318; *Leavenworth v. Packer*, 52 Barb. 135; *Woodruff v. Peterson*, 51 Id. 255; *Weaver v. Wiener*, 51 Id. 641; *McCormick v. Saron*, 45 N. Y. 268; *Neaffle v. Hart*, 4 Lana. 5, 7; *Greenthal v. Schneider*, 52 How. Pr. 134; *Stafford v. Pooler*, 67 Barb. 147; *Locke v. Williamson*, 40 Wis. 381; *Dutchess Co. v. Harding*, 49 N. Y. 324; *Delafield v. De Grauw*, 1 Abb. App. 503; S. C., 3 Keyes, 471, to the same point; *Carpentier v. Minurn*, 65 Barb. 297; *Pomeroy v. Shaw*, 2 Daly, 270; *Heydecker v. Lombard*, 7 Id. 21; *Holden v. Clancy*, 41 How. Pr. 5; *Normington v. Cook*, 2 Thomp. & C. 424. There is, however, no necessity for returning or offering to return worthless property before action brought, as where grape-roots are dead and worthless when offered for acceptance: *Stone v. Frost*, 6 Lana. 443. This is upon the principle that a vendee is not bound to receive and pay for a thing that he has not agreed to purchase: *Pomeroy v. Shaw*, 2 Daly, 270; but the right of complaint does not survive the acceptance after opportunity to ascertain the defect: *Gantier v. Douglass Mfg. Co.*, 13 Hun, 525; *Beck v. Sheldon*, 48 N. Y. 373; *Neaffle v. Hart*, 4 Lana. 5, 7. The vendee, however, is not bound to return property warranted in an executory contract upon discovering the breach: *Day v. Pool*, 52 N. Y. 421; but he may retain and use the same and have his remedy upon the collateral contract of warranty: *Id.*; *Gurney v. Atlantic etc. Ry Co.*, 58 Id. 364; *Zeller v. Rogers*, 7 Hun, 542; *Diks v. Reitlinger*, 23 Id. 243; *Nichols v. Townsend*, 7 Id. 378; *People v. Stephens*, 51 How. Pr. 249; *Rust v. Eckler*, 41 N. Y. 494; *Haviland v. Johnson*, 7 Daly, 302. It is only in cases of executory contracts, and without warranty, that a purchaser, by accepting and retaining goods, will be held to have waived all defects in their quality, where a reasonable time and opportunity for examination has been given, and he fails to notify the seller to take them back: *Marcus v. Thornton*, 12 Jones & S. 415. But it must be observed that an express warranty accompanying the delivery of property upon an executory contract is not unlawful, nor against public policy, and the question in such cases must therefore be one of interpretation, whether in fact such a contract has been entered into: *Parks v. Morris & etc. Co.*, 54 N. Y. 590.

Where goods have been sold on an executory contract with an express warranty, the purchaser's acceptance is qualified by the warranty, and is to be construed with reference to it. He is not only not bound to return the goods, but he has no right to return them, and the vendor is not bound to receive them: *Rust v. Eckler*, 41 N. Y. 494. And the principal case is not inconsistent with this view, for it does not apply to cases of warranty, and must be distinguished from such cases: *Parks v. Morris & etc. Co.*, 54 Id. 590; *Zeller v. Rogers*, 7 Hun, 542; *Nichols v. Townsend*, 7 Id. 378; *Messenger v. Pratt*, 3 Lana. 235; *Foot v. Bentley*, 44 N. Y. 170; *Downes v. Dow*, 57 Id. 22; *Cohen v. Platt*, 8 Jones & S. 491. In executory sales of goods there is an implied engagement in the contract itself, that the article sold shall be merchantable: *Newbery v. Wall*, 3 Id. 111; *Hamilton v. Ganyard*, 3 Keyes, 46; *White v. Miller*, 7 Hun, 436; or if sold for a particular purpose, that it shall be suitable and proper for such purpose: *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 518; and if defective for such purpose, the vendee may return it, and recover any sum paid thereon with interest: *Woodle v. Whitney*, 23 Wis. 56; or, after tender of it to the vendor and his refusal to receive it back, he may sell it at the best price he can obtain, without notice as to time and place of sale: *Messmore v. New York Shot and Lead Co.*, 40 N. Y. 430. But if the vendee had an opportunity before purchase to examine the article, the principal case is inapplicable; *Kesler v. Vanderveer*, 5 Lana. 315. Acceptance of goods

under an executory contract can never operate as a waiver or discharge of a fraud practiced by the seller upon delivery to induce such acceptance: *Willard v. Merritt*, 45 Barb. 297. But an acceptance of property, under a contract of purchase, induced by fraud, and payment for the same with knowledge of the fraud, is a waiver of the fraud, and of all objections which might have been taken, and founded thereon: *People v. Stephens*, 71 N. Y. 557. The application of the principal case must also be distinguished with respect to quantity as against quality. In an executory contract for the sale of goods, the purchaser may, if the contract be severable in respect to the delivery, accept and use any portions as delivered without waiving any right which may arise from a deficiency in the amount ultimately delivered. It is otherwise when the contract is a unity, and all the goods are to be delivered at one time: *Visscher v. Greenbank etc. Co.*, 11 Hun, 160. And although the vendee is bound by his acceptance of a portion of several articles contracted to be sold, after having had an opportunity to examine them, yet the vendor is not thereby excused from the non-fulfillment of his contract as to the residue of such articles. If the vendee refuse to receive the whole of the inferior articles, or any part of them, the vendor is liable in damages for the non-fulfillment of his contract in full. He cannot relieve himself from the fulfillment of the contract on his part, by inducing the vendee to accept some part of the articles contracted to be delivered: *Kipp v. Meyer*, 5 Hun, 111. The points of the principal case are summarized in *Wells v. Schoood*, 61 Barb. 244; *Day v. Pool*, 63 Id. 514; and it was held inapplicable in *Harris v. Rathbun*, 2 App. Dec. 333; S. C., 2 Keyes, 315, 319, to the same point; *Massmore v. New York Shot and Lead Co.*, 40 N. Y. 428.

BROWNELL v. WINNIE.

[29 NEW YORK, 400.]

ALTERATION OF WRITTEN CONTRACT IN MATERIAL PART, WITHOUT CONSENT OF PARTIES, DISCHARGES THEM from liability. This rule applies to bills and notes as well as to all other species of contract.

SEVERAL PROMISSORY NOTE IS NOT MATERIALLY ALTERED by the addition of the name of another person as maker, without the knowledge or consent of the original signer.

JOINT AND SEVERAL PROMISSORY NOTE, SIGNED BY TWO PERSONS AS MAKERS, IS MATERIALLY ALTERED by the addition of the name of another person, without the knowledge and assent of one of the makers.

CONTRACT OF SEVERAL MAKER OF NOTE IS NOT CHANGED by permitting parties to be united in the same action with him. It is still a several contract, and is joint only for the purpose of the remedy upon it.

COUNTY COURT MAY, ON APPEAL FROM JUSTICE'S COURT, MODIFY JUDGMENT according to the justice of the case, without regard to technical errors.

GENERAL TERM OF SUPREME COURT MAY, ON APPEAL FROM SPECIAL TERM, ALTER JUDGMENT of such special term in the interest of justice, neglecting technical errors.

COURT OF APPEALS MAY ALTER JUDGMENT, in interest of justice, disregarding technical errors.

APPEAL from a judgment of the supreme court reversing judgments of the county court, and of a justice of the peace.

The action before the justice was on a note made by one Swinerton, dated January 21, 1856, to the order of defendant, Winnie, for the sum of fifty dollars, and payable with interest on April 1, 1856. It was alleged in the complaint that after the note was made it was delivered to Winnie; that Winnie afterwards, on or about October 1, 1856, applied to the plaintiff to let him (Winnie) have the money on it; that the plaintiff agreed to do so if Winnie would sign his name to it, or become responsible to pay the same; that defendant signed the note, and delivered it to the plaintiff, who let Winnie have the money on it; that forty-one dollars had been paid on the note; and that the balance was still due thereon. Defendant's answer denied the whole complaint, and set up as defenses, payment, usury, want of consideration, the statute of limitations, and that the plaintiff was not the owner. These facts were substantially proved on the trial, and the justice rendered judgment on the note for \$17.45 damages, and \$1.37 costs. This judgment was affirmed on the defendant's appeal to the county court. Defendant then appealed to the general term of district No. 7, which court reversed both the aforesaid judgments, on the ground that adding the name of Winnie to the note after the note had become operative against Swinerton, without the consent of the latter, was such an alteration of it as avoided it, as against the parties. Plaintiff then appealed to this court. By computing interest on the \$50 from the time it was advanced by the plaintiff to Winnie, and allowing the payment of \$41, which was made by Swinerton, the amount due from the defendant at the time of the judgment would be \$14.31, instead of \$17.45 allowed by the justice, \$17.45 being the amount due on the note, computing interest from its date, after deducting the payment of \$41 above mentioned.

James S. Angle, for the appellant.

John Van Voorhis, Jr., for the respondent.

By Court, MULLIN, J. It has been too long and too well settled to be open for discussion, that an alteration of a written contract in a material part, without the consent of the parties, discharges them from liability. This rule applies to bills and notes as well as to all other species of contract.

It was held in England, in *Gardner v. Walsh*, 32 Eng. L. & Eq. 162, that the addition of the name of a person to a joint and several promissory note, signed by two as makers, without the knowledge and assent of one of them, was such a material

alteration as avoided the note. The same principle was applied in this state, in *Chappell v. Spencer*, 23 Barb. 584, and in *Edwards on Bills*, 681.

In those cases, and in others which might be cited, the notes alleged to be altered were in terms joint and several. But I have found no case, and none has been cited, holding that a name added to a several note is such a material alteration as avoids it; and upon principle, I can perceive no reason why it should be so held.

A note written "I promise to pay," etc., can never be made a joint contract, however many names may be added to it. The law permits an action against the makers as upon a joint or several contract, but the contract itself is not changed. The liability of the first signer is the same, however many may be joined in the action with him. The note continues to be payable on the same day, at the same place, and to the same person, and for precisely the same amount; and if there are any other parts of the obligation which can be considered material in the sense that an alteration in that respect vitiates the note, I am unable to comprehend it. Permitting parties to be united in the same action with a several maker does not change the contract. If that were so, the law of 1831, which permitted all the parties to a bill or note to be united in the same action, would have been unconstitutional, as impairing the obligation of existing contracts, for then every bill or note then in existence would have been rendered void, unless actions thereon were prosecuted under the previous law. But no one supposed it was not entirely competent for the legislature to regulate the mode of enforcing such contracts by uniting such and so many of the parties in one action as it deemed proper. But it may be said that in the case of notes and bills, the contract, although in form several, yet when signed by two or more persons it may be sued upon as a joint or several paper, is a rule of law which becomes a part of the contract, and the contract is to be construed in reference to it. This consideration does not change it. It is still a several contract, and is joint only for the purpose of the remedy upon it.

Again, if a several note is avoided by adding thereto the name of another as maker, without the consent of the first signer, who should be permitted to avail himself of the objection? Not the last signer, surely, for as to him the contract only takes effect from the day of transfer and to the amount he receives. His contract is not identical with that of the

first maker, and signing by the second maker does not and cannot vary the contract of the first: *Cobb v. Titus*, 10 N. Y. 198, and cases cited. Whatever right the first maker may have to complain, the second can have none.

The case of *Partridge v. Colby*, 19 Barb. 248, decides the question under consideration in accordance with the foregoing views. But that case was overruled by the case of *Chappell v. Spencer*, 23 Id. 584. Although that case has not been itself overruled, yet this court, in *Cobb v. Titus*, 10 N. Y. 198, came to a conclusion wholly at war with that case, and must be understood as overruling it and the cases on which it rests. In *Cobb v. Titus*, *supra*, the note was made by Viele, payable to Robert Titus, or order, and delivered to him for a valuable consideration. Titus applied to the plaintiff to raise the money upon it, who refused to let him have it unless he would get O. N. Titus to indorse or sign it as security. O. N. Titus did sign it as security, and the plaintiff paid therefor fifteen dollars less than its face. The note was on interest. Viele and O. N. Titus were sued; the former permitted judgment to pass against him, and the latter defended. There was judgment for the plaintiff for the amount advanced on the note by the plaintiff, and the case came to this court on appeal. Justice Allen, in his opinion, which was adopted as the opinion of this court, says: "The note is none the less the several note of Viele, and valid as such, because the defendant has subscribed his name to it as surety, and thus become collaterally liable for its payment. A difficulty might arise in treating it as a joint note, but that is obviated in this case."

Although the point does not appear to have been distinctly presented in the case of *Cobb v. Titus*, 10 N. Y. 198, that adding the name of O. N. Titus was such an alteration of the note as avoided it, yet the court could not have decided the case in favor of the validity of the note without meeting and disposing of that question. It could not have been valid against Viele, as Justice Allen says it was, if the addition of the name of Titus rendered it void.

The case of *Cobb v. Titus*, 10 N. Y. 198, was understood by the supreme court in *Burton v. Baker*, 31 Barb. 241, as holding that the addition of a maker did not vitiate the note, and such, it seems to me, should be the law, especially as between the holder and the last signer of the note.

The judgment of the supreme court must be reversed, and that of the county court and of the justice affirmed. But as

the plaintiff was only entitled to recover the money paid by him, and interest, deducting therefrom all payments made by the first signer, the judgment of the justice was for too much. Instead of being for \$17.45 damages, it should be for \$14.31; and unless the plaintiff will stipulate to allow this sum in reduction of the judgment, the judgment of the supreme court must be affirmed.

The county court had authority, under section 366 of the code, to modify the judgment according to the justice of the case, without regard to technical errors. The general term has the same power: *Staats v. Hudson River R. R. Co.*, 23 How. Pr. 463; *Fields v. Moul*, 15 Abb. Pr. 6. This court has the same power: *Tillou v. Kingston M. Ins. Co.*, 5 N. Y. 405; *Chouteau v. Suydam*, 21 Id. 179.

The judgment of the general term must be affirmed, unless the plaintiff will stipulate to deduct from the judgment of the justice the sum of \$3.14 as of the day the judgment was rendered by the justice, in which event the judgment of the supreme court must be reversed, and that of the justice and of the county court affirmed as modified.

All the judges concurring, judgment accordingly.

MATERIAL ALTERATION OF WRITTEN CONTRACT WITHOUT CONSENT OF PARTIES, EFFECT OF, particularly as to negotiable instruments: See note to *Fay v. Smith*, 79 Am. Dec. 754; note to *Williamson v. Smith*, 78 Id. 486; *Holland v. Hatch*, 71 Id. 363, and note 369; *Ames v. Colburn*, 71 Id. 723; *Humphreys v. Guillow*, 38 Id. 499, and note 501.

IMMATERIAL ALTERATION OF WRITTEN CONTRACT does not affect it. For illustrations, see *Struthers v. Kendall*, 80 Am. Dec. 610; *Reed v. Roark*, 65 Id. 127, and cases cited in note thereto illustrating cases of both material and immaterial alterations; note to *Ames v. Colburn*, 71 Id. 724; *Eddy v. Bond*, 36 Id. 767.

CHANGING JOINT AND SEVERAL PROMISSORY NOTE INTO JOINT ONE IS MATERIAL alteration of the instrument: *Humphreys v. Guillow*, 38 Am. Dec. 499.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: The supreme court, on appeal from a county court, has authority to correct the judgment by conforming it to the pleadings in the amount. In such a case, it is the duty of the court to reverse for the erroneous part, and affirm as to the residue: *Weed v. Lee*, 50 Barb. 355; *Van Slyck v. Snell*, 6 Lans. 302; *Davis v. Gwynne*, 4 Daly, 222. The same right and duty appertain to the county court; and if that court fails to exercise the right, it is the duty of the supreme court and the court of appeals to modify and correct the judgment of the justice: *Weed v. Lee*, 50 Barb. 355. But where a recovery has been had upon distinct and separate items, the judgment should be reversed only as to the erroneous items, and affirmed as to the residue, and upon condition that plaintiff consents to forego his claim

to recover them: *Whitehead v. Kennedy*, 69 N. Y. 468; *Shaw v. Davis*, 56 Barb. 402. The addition of two names to a promissory note as makers, after its execution and delivery, without the knowledge or consent of a person who previously signed it as a surety for the original maker, is a material alteration of the instrument as against such surety, and furnishes him, at his election, with a valid defense to the note: *McVean v. Scott*, 46 Id. 385. But adding a name to a note as an additional surety, with the assent of the payee, and with the assent and at the request of the personal representative of the original surety, and with the agreement that the estate should not be released, is not such an alteration as will release the estate of the original surety: *Votles v. Green*, 43 Ind. 376. Where the payee of an individual promissory note, after its delivery to him, induces another person to sign it, it will be held, in an action against the maker by an innocent holder, that the alteration is not material, and will not affect the validity of the note: *Card v. Miller*, 1 Hun, 506; S. C., 3 Thomp. & C. 634. These cases show that the authorities upon this subject are conflicting. As opposed to the principal case, it is held in *Wallace v. Jewell*, 21 Ohio St. 171, that a promissory note in the form, "I promise," etc., and signed by several parties as makers, is joint as well as several.

DUNN v. PEOPLE.

[29 NEW YORK, 522.]

COMPETENT WITNESS IN CASE OF ABORTION, WHO IS. — If person being tried on an indictment for giving medicine to produce a miscarriage tries to show that another was the father of the child of which the prosecutrix was envious, the prosecution may call the latter to prove that he had no intercourse with the woman.

WOMAN, TO WHOM MEDICINES WERE ADMINISTERED TO PRODUCE MISCARRIAGE is victim rather than an accomplice; even if deemed accomplice she is competent for prosecution as a witness against the accused; and her testimony does not require corroboration where it establishes satisfactory proof of guilt.

WHILE NOT GENERALLY DISCRET FOR JURY TO CONVICT UPON UNSUPPORTED TESTIMONY OF ACCOMPLICE, it is not the law that a conviction upon such testimony can in no case be had.

WHERE WITNESS HAS SWORN DIFFERENTLY UPON SAME POINT ON FORMER OCCASION, his testimony should remain in the case, to be considered by the jury in connection with the other evidence, under such prudential instructions as may be given by the court, and subject to the determination of the court having jurisdiction to grant new trials in cases of verdicts against evidence. The judge is not to pronounce the witness incompetent, and order his testimony stricken out and wholly excluded from consideration as though he had been convicted of a crime rendering him incompetent to testify as a witness.

SELF-CONTRADICTION BY WITNESS OF EVIDENCE IN FORMER TRIAL GOES TO DISCREDIT HIM, but the jury may consider his evidence for what they think it is worth.

PLAINTIFF in error was convicted for advising and procuring one Susanna Guyer, a pregnant woman, to take a certain

medicine, called "Dr. Johnson's French Female Pills," with intent thereby to procure her miscarriage. She was the principal witness for the prosecution, and from her testimony it appeared that she became pregnant by the defendant on March 30, 1861; that in May following, she having communicated the fact to him, he gave her a box of Johnson's Female Pills, and told her to take them; that they would "miscarry the child"; that she took four of the pills, and not feeling well afterwards she took no more. This occurred in Erie County, New York. Prior to her confinement she went to Goderich, Canada, where her husband was; and while there the defendant sent her a trunk of clothing which she had left behind, and which contained another box of the same pills. She took none of them, however, and was afterwards delivered of a child. The first box of pills was produced in court, and identified as having been received from him. One of defendant's letters to her was also given in evidence. It mentioned the sending of the clothes, but did not refer to the box of pills. She admitted, on her cross-examination, that she had stated that the father of the child was one Dwight Hodge, and the fact that she had so stated was proved by another witness. She further admitted in her testimony, that on an examination in a proceeding against the defendant before certain magistrates, under the statute respecting the support of bastard children, she had testified, as a witness, that she had not had connection with any man except the defendant for a year and a half; that she had not had connection with her husband since she separated from him some years before; that she had never been in Goderich, in Canada; and that she had never told any one who the father of the child was until after it was born; all of which statements she admitted to be untrue. It was proved by another witness that Susanna rode out with the defendant on March 30th, that being the occasion on which she swore that the intercourse took place by which she became pregnant. Defendant's cross-examination of one of the witnesses for the prosecution showed that Mrs. Guyer had resided for some time at the same house in which D. Hodge lived, and that there were opportunities for him to have gone to her lodging-room in the night without it being known. Hodge was called by the prosecution, who offered to prove by him that he had never had sexual intercourse with Susanna Guyer. Defendant's counsel objected. The court then inquired of the defendant's counsel whether he intended to claim that such intercourse

had taken place. The answer was, that he should so claim. The objection was overruled by the court, and the witness Hodge denied that he had ever had such intercourse. The prosecution having closed, the defendant's counsel requested the court to charge that the defendant ought not to be convicted on the uncorroborated testimony of Susanna Guyer. for the reason that she was an accomplice; and ~~because~~, by her own confession, she had been guilty of perjury. ~~and was~~ therefore unworthy of credit. The court refused to give this request, but did charge that the fact that the woman had sworn differently on the former occasion was a strong circumstance tending to discredit her testimony; but that if, after taking these circumstances into consideration, in connection with the other matters testified to by her and the other witnesses, and properly weighing all the testimony in the case, they were satisfied, beyond a reasonable doubt, that the defendant was guilty of the offense charged, it would be their duty to convict him. But that if, after carefully looking at the testimony, a reasonable doubt should fairly arise, it would be their duty to acquit him; and that the credit to be given to the woman was peculiarly a question for them. Defendant's counsel also requested an instruction to the effect that if she was uncorroborated in her testimony it would be unsafe to convict the defendant, on account of her being an accomplice, and because she had sworn falsely on the former occasion, and that they ought to acquit him. The court, however, declined to give any different or further charge, and the defendant's counsel excepted to the ruling against him on all these points. Verdict, and judgment for three months' imprisonment at hard labor. Defendant brought error on a bill of exceptions to the supreme court, which affirmed the judgment. Upon this judgment of affirmance a writ of error was brought.

W. Dorsheimer, for the plaintiff in error.

C. C. Torrance, for the defendant in error.

By Court, DENIO, C. J. There was no well-founded objection to the testimony of Hodge against the reception of which the defendant excepted. It was a material fact, if it was a fact, that the defendant was the father of the child of which the prosecutrix was *enccinte*. It would afford a motive on his part for the commission of the offense imputed to him in the indictment, as that would tend to shield him from the probable consequences of his misconduct. The woman had sworn positively

that the defendant was the father; but her testimony on that point was much shaken by the prior statements which she admitted she had made, and which were otherwise proved, which charged Hodge as the father. These statements of hers, though well calculated to impair her credit, had no legal tendency to implicate Hodge, for they were not made on oath, but were mere hearsay. If this were all the foundation which had been laid, it would not have been competent for the prosecution to have examined Hodge to establish the fact that he was not the father. There was not, thus far, any more occasion for exonerating him than any other person, and the testimony would have been idle, and it might have been mischievous. But the defendant had given some evidence, by the cross-examination of one of the witnesses for the prosecution, tending, in a very slight manner it is true, to show an intercourse with Hodge. Standing alone it would not have amounted to anything, but it indicated the line of defense which the accused designed to pursue. The court, before deciding upon the competency of the question put to Hodge, inquired of the defendant's legal advisers whether they intended to claim that there had been an illicit intercourse between the prosecutrix and Hodge, and they avowed that such was their intention. The question whether Hodge was the father of the child henceforth became one of the subordinate issues in the case, and the question to Hodge, bearing directly and conclusively upon that point, became not only competent, but was quite important. It is not a sufficient answer to this view that the testimony by which the defendant claimed to implicate Hodge was insufficient for that purpose. It had been given by the defendant, and had been received without objection. It was before the jury, and might have been the subject of comment by the defendant's counsel. Indeed, they gave notice, in substance, that they should rely upon it to show that Hodge, and not the defendant, might have been the father, and thus to take away or diminish the probability that the defendant would take steps to remove the consequences of the intercourse. If the declaration of the counsel, in their answer to the court, is to be understood as a statement that they should claim that there had been intercourse with Hodge upon other evidence to be afterwards given by the defense, the denial of Hodge would still have been competent; for it was within the discretion of the court to prescribe the order of the testimony, and there would be no error in allowing a witness to rebut, by way of

anticipation, a defense which the other party avowed he should set up and attempt to prove. In either view, error cannot be predicated on this ruling.

The position that an acquittal should have been directed on the ground that the female was an accomplice and was not corroborated in her testimony, was not urged in the argument, though taken on the trial. It could not, however, have been sustained. She did not stand legally in the situation of an accomplice; for although she no doubt participated in the moral offense imputed to the defendant, she could not have been indicted for that offense. The law regards her rather as the victim than the perpetrator of the crime: *Rex v. Hargrave*, 5 Car. & P. 170; *Queen v. Boyes*, 1 Best & S. 311; 101 Eng. Com. L. 309. But if she had been an accomplice in the strict sense of that term, the direction asked for could not properly have been given. Although it is not generally discreet for a jury to convict upon the unsupported testimony of an accomplice, it is not the law that a conviction upon such testimony can in no case be had: *People v. Costello*, 1 Denio, 83, and cases cited by Beardsley, J.; *People v. Dyle*, 21 N. Y. 578; *Queen v. Boyes*, *supra*.

The point most earnestly insisted on before us was, that the jury should have been instructed to acquit the defendant on account of the false testimony which the principal witness admitted she had given upon her examination before the magistrates. Upon this position there is a case which looks like an authority favorable to the defendant. In *Dunlop v. Patterson*, 5 Cow. 243, a judgment of the court of common pleas in a civil case was reversed because a witness for the plaintiff, who alone proved the case against the defendant, had testified in a former suit upon the material question involved in the issue directly contrary to the testimony which he gave in that case. A motion for a nonsuit was denied, and the jury were charged that the witness was competent, and that the jury might give that weight to his testimony which they thought it demanded. The opinion of the supreme court, on reversing the judgment, delivered by Mr. Justice Woodworth, contains several expressions which indicate that in the opinion of the learned judge it was a conclusion of law that a witness so impeached could not be credited, and that the duty of the court was to direct that his testimony should be wholly disregarded; while there are other parts which convey the idea that the error was in not sufficiently cautioning the

jury against the dangerous character of such testimony. It is said, for instance, that the court ought to have charged the jury that the testimony of the witness was so strongly impeached as to justify them in disregarding it altogether; that the unsupported testimony of a single witness, who swore at one time in direct contravention to the testimony given by him at another, in relation to the same transaction, was not entitled to credit, and ought not to be regarded. In another place it is said that no reason whatever was assigned by the witness for his prevarication and disregard for truth, and that he was not therefore a credible witness, unless supported as to the material fact which he attempted to establish. It is to be implied from this that if he had explained his self-contradiction in some reconcilable way, or if he had been supported to some extent as to the material fact, his testimony might then have been taken into consideration and estimated by the jury at what it should have been considered worth. And there is, moreover, an implication that if a more cautious charge had been given, and the testimony had still been left to the jury, there would have been no error in law. This I think leaves the question of law, as to the character of such testimony, in a very unsatisfactory position. The true question is, whether, when it appears that the witness has sworn differently upon the same point on a former occasion, he is to be pronounced by the judge to be incompetent, and his testimony stricken out and wholly excluded from consideration, as though he had been convicted of a crime rendering him incompetent to testify as a witness, or whether the testimony remains in the case, to be considered by the jury in connection with the other evidence, under such prudential instructions as may be given by the court, and subject to the determination of the court having a jurisdiction to grant new trials in cases of verdicts against evidence. In my opinion, the latter is the correct principle of law.

If the testimony of such a witness were by law unfit to be considered, no amount of consideration or of intrinsic probability or coherence of circumstances or explanation of the former testimony would carry it to the deliberations of the jury. But the contrary of this, as I have said, is clearly implied by the opinion we are considering. That case can, I think, only be sustained, if at all, by considering the reversal as based upon an error of the court of common pleas, in its instruction upon the weight to be attached to the evidence of

the witness who was impeached by his former testimony. It was not decided that such testimony could not be considered at all, but only that the jury would be justified,—that is, that they had the right to disregard it under the circumstances of the case. The court could not go further without usurping the domain of the jury; for to them the law has intrusted the right of determining upon the credibility of witnesses. I quite agree that it is the duty of the court, in such cases, to be sedulous in guarding the jury against hastily or inconsiderately acting upon the testimony of the witness, but it has no right to direct an acquittal on such grounds, or to instruct them as matter of law wholly to disregard the testimony; or, what is the same thing, entirely to withdraw it from their consideration. And I am not of opinion that error can be predicated upon the greater or less cogency or earnestness with which the necessary caution may be given, provided their attention is fairly called to the discrediting circumstance. It is a matter of common experience and observation that when the testimony of a witness contradicts what he has formerly asserted, it detracts from the credit to be given him; and if such former statement was made in a deliberate manner, and especially if it was under the solemnity of an oath, and in a case where the same question of fact was involved and was material, the degree of credit attributable to his former statement is proportionately diminished, or it may be wholly destroyed if the jury so determine. I think the charge in the present case was unexceptionable in point of law. The court called the attention of the jury to the sworn contradiction of herself by the principal witness, and said that it was a strong circumstance tending to discredit her testimony on that trial; but that the amount of credit due to that testimony was a question for them to determine; adding that if a reasonable doubt arose in their minds it was their duty to acquit the defendant. If after that charge there was an improper verdict, it was the fault of the jury and not of the court. If the request to charge further had been acceded to, the direction would have been, in effect, the ordering a verdict of acquittal. Such an order the court had no right to make.

I am for affirming the judgment of the supreme court.

INGRAHAM, J. The main question in this case is, whether Mrs. Guyer, the person who was the complainant, did not, by her admissions of what she testified to on a former trial, become so impeached as to make it the duty of the court to instruct

the jury "that she was unworthy of credit, and unless her testimony was corroborated by other evidence, it was unsafe to convict the prisoner."

The facts as testified to by her on this trial, and as to which she admitted she had sworn falsely on a former trial, were in relation to the paternity of the child. These facts were directly in issue in the first proceeding, but on this trial were not necessary or material to prove the case of the people, but were only admissible for the purpose of showing motive on the part of the prisoner in advising the use of means to produce an abortion.

In *Dunlop v. Patterson*, 5 Cow. 243, the rule was adopted as a correct one, that where the evidence was material to the issue, and the witness admitted he had sworn falsely on a former trial, the court should so instruct the jury. It is very clear that a witness who admits upon the trial that he has deliberately sworn to a statement in direct contradiction to that given by him upon the trial, can furnish no satisfactory evidence upon which either life, liberty, or property should be taken away, unless his testimony is so corroborated as to remove the presumptions against him. In that case, however, the testimony was material in both actions; and unless it be held that proof of motive was material in this case, and that the former statement of Mrs. Guyer, that the prisoner was the father of the child, tended to prove such motive, the evidence in this case would not be of that character. This evidence to prove who was the father of the child can scarcely be said to be material to prove that the prisoner had been guilty of the crime charged, viz., aiding or advising the producing of an abortion. It was collateral to proof of the offense to show that the prisoner was such father, but it was not necessary to make out the offense either that such should be the fact, or to prove it on the trial if it was so. This contradiction of the witness by herself on a former occasion should have greatly discredited her with the jury, but I think was properly left to them, and there is no rule of law which authorized the court to take it from them.

Nor does the suggestion that Mrs. Guyer was an accomplice aid the prisoner in rejecting her testimony. This point was expressly held in *People v. Costello*, 1 Denio, 83, and a charge that the jury should convict on the testimony of an accomplice, uncorroborated, was sustained. This decision was disapproved in this court by Bowen, J., in *Haskins v. People*, 16 N. Y. 344, although this rule was not necessarily involved in that case.

Such I suppose to be the true rule; and while a jury should be cautioned against giving credit hastily to the uncorroborated evidence of an accomplice, still, if such evidence furnishes to them satisfactory proof of guilt, and they so find by their verdict, the want of corroborating evidence is no ground for granting a new trial.

The objection to admitting Dwight Hodge to testify that he never had sexual intercourse with the witness Guyer was not well taken. Mrs. Guyer had herself proved on the trial that he had not had such intercourse, and that her statement to that effect was untrue. The introduction of such evidence afterwards tended to confirm the testimony of the witness on this trial, and not to impeach her. The judgment should be affirmed.

All the judges concurring, judgment affirmed.

EVIDENCE AND WITNESSES IN PROSECUTIONS FOR PROCURING ABORTION: See extended note to *Abrams v. Foshee*, 66 Am. Dec. 91, citing the principal case.

WOMAN UPON WHOM ABORTION IS PRODUCED IS NOT ACCOMPLICE: See extended note to *Abrams v. Foshee*, 66 Am. Dec. 87, citing the principal case.

PRISONER MAY BE CONVICTED UPON UNCORROBORATED EVIDENCE OF ACCOMPLICE: See extended note to *Commonwealth v. Price*, 71 Am. Dec. 671-678, on evidence of accomplices, and citing the principal case. This note treats of statutes requiring and regulating corroboration.

THE PRINCIPAL CASE IS CITED in each of the following authorities and to the point stated: The credibility of a witness is a question peculiarly within the province of the jury. They must determine the just weight and force to be given to his testimony, and the extent to which he is to be believed when he is discredited, from the fact of being an accomplice, or interested, or when his testimony is otherwise questioned: *Holge v. City of Buffalo*, 1 Sheld. 421; S. C., 1 Abb. N. C. 360, to the same point; *Pease v. Smith*, 61 N. Y. 483; *Cohn v. Goldman*, 11 Jones & S. 449; *New York G. & I. Co. etc. v. Gleason*, 78 N. Y. 511; S. C., 7 Abb. N. C. 350, to the same point; *Roth v. Wells*, 29 N. Y. 492; *White v. McLean*, 47 How. Pr. 199. And this is the general rule applied to all testimony when once admitted into the cause. The most that the judge can do is to caution the jury to weigh such testimony with care and close scrutiny: See principal case; *Pease v. Smith*, 61 N. Y. 483; *White v. McLean*, 47 How. Pr. 199, 200. Although it is not usual to suffer a conviction upon the wholly uncorroborated evidence of an accomplice, and juries are advised not to convict without a confirmation as to the material facts, still, if the jury are fully convinced of the truth of the statements of a witness thus situated, they may convict upon his testimony alone: *Lindsay v. People*, 63 N. Y. 154; *New York G. & I. Co. v. Gleason*, 78 Id. 511; S. C., 7 Abb. N. C. 350, to the same point; *Lee v. Chadsey*, 2 Keyes, 548, 549; *Yngvarsson v. Salomon*, 3 Daly, 158; *Royal Ins. Co. v. Noble*, 5 Abb. Pr., N. S., 57. Courts may exercise a wise discretion as to the "order of proof," and may rely upon the avowals and declared purposes of reputable counsel that needful connecting proof will be forthcoming: *McCarney v. People*, 83 N. Y.

415. For citations of the principal case on the fourth point of the syllabus, *supra*, see note *infra*.

CASES WHERE JURY MAY BE INSTRUCTED TO DISREGARD EVIDENCE OF WITNESS WHO WAS COMPETENT TO TESTIFY. — 1. *Credibility of Witnesses is for Jury*. — It is the duty of the court to determine the competency of testimony, but never its credibility: *Hodge v. City of Buffalo*, 1 Sheld. 420. And this view should especially prevail at this time, when all the former rules in regard to the competency of a witness are abolished, and everything is reduced to the theory of credibility in the discretion of the jury: *Lee v. Chadsey*, 2 Keyes, 543. The question of credibility is altogether for the jury, not for the court: *Mack v. State*, 48 Wis. 286; *Mechelke v. Bramer*, 59 Id. 57; *Chester v. State*, 1 Tex. App. 702; *State v. Smallwood*, 75 N. C. 104; *McRae v. Lawrence*, 75 Id. 289; *Hodge v. City of Buffalo*, 1 Sheld. 420; *Kansas etc. R'y Co. v. Little*, 19 Kan. 267; *Nelson v. Vorce*, 55 Ind. 455; *Smith v. Grimes*, 43 Iowa, 356; *Green v. Cochran*, 43 Id. 544; *Stampofski v. Steffens*, 79 Ill. 303; *Evans v. George*, 80 Id. 51; *Clevenger v. Curry*, 81 Id. 432; *Bowers v. People*, 74 Id. 418; *Rider v. People*, 110 Id. 11; *U. S. v. Borger*, 19 Blatchf. 249; *Finerty v. Fritz*, 6 Col. 137; *Fleming v. Marine Ins. Co.*, 33 Am. Dec. 33; extended note to *Robertson v. Dodge*, 81 Id. 268, 270, on disregard by jury of uncontradicted and unimpeached witness; *Nicholson v. Conner*, 8 Daly, 212; *Kintner v. State*, 45 Ind. 175; *Parsons v. Huff*, 41 Me. 410. And the court are not to instruct that certain things affect the credibility of a witness after his testimony has once been admitted into the cause; for an expression of the court in its charge to the jury, calculated to influence their decision in a matter clearly within their cognizance, will be critically scrutinized. To be free from legal objection the instruction of the court must be advisory merely, and not put in the form of a direction as matter of law, and must be accompanied by explicit instructions that it is the duty of the jury to consider the evidence and decide as they think the truth requires: *Allis v. Leonard*, 58 N. Y. 288; *Leibig v. Steiner*, 94 Pa. St. 466; *Brett v. Catlin*, 47 Barb. 404; *State v. Rash*, 12 Ired. 382; S. C., 55 Am. Dec. 420. Thus the jury must not be instructed that it is a rule of law, a presumption, that men testify truly and not falsely: *State v. Jones*, 77 N. C. 520; or that courts look upon the testimony of experts with suspicion: *De Long v. Giles*, 11 Bradf. 33; or that the testimony of an impeached or discredited witness is to be believed or disbelieved: *Roach v. People*, 77 Ill. 25; or that the testimony of experts is usually of very little value in determining the sanity or insanity of a party: *Eggers v. Eggers*, 57 Ind. 461; or that, as a matter of law, the evidence of a party must be viewed with suspicion: *Kansas etc. R'y Co. v. Little*, 19 Kan. 267; or that certain facts have diverted suspicion from his testimony: *State v. Collins*, 20 Iowa, 85; or that, as matter of law, relatives of a party litigant must be "held to be more or less biased against the adverse party": *Kansas etc. R'y Co. v. Little*, 19 Kan. 267; or that they cannot consider the fact that a certain witness was not introduced: *State v. Smallwood*, 75 N. C. 104; or that, as matter of law, the testimony of the trustees who cast the ballots in an election for the county superintendent of schools is the best evidence in the absence of the ballots: *State v. Sutton*, 99 Ind. 300; or that the testimony of the defendant in a criminal case is to be believed or disbelieved: *Chambers v. People*, 105 Ill. 409; for casting the influence of the court against the testimony of a particular witness, or the character of the evidence he gives, is not the usual way of either affecting the credibility of witnesses or the weight of testimony: *Rafferty v. People*, 72 Id. 37. The jury, however, may be properly instructed to consider the fact

that defendant is a witness in his own behalf in determining the credit to be given to his testimony, for this would still leave the question of credibility to the jury: *State v. Maguire*, 69 Mo. 197; *State v. Zorn*, 71 Id. 415; but in such a case it cannot be declared as a matter of law that his testimony in his own behalf is entitled to the same credit as if he were testifying in a civil suit in his own behalf: *State v. Cooper*, 71 Id. 436. The court must not indicate its leaning against one of the parties to a suit: *Kistner v. State*, 45 Ind. 175.

2. *Interest goes to Credibility.* — The interest of a party, if it has any effect at all, goes to the question of credibility, and that must be left to the jury: *Hodge v. City of Buffalo*, 1 Sheld. 420; *Giltner v. Gorham*, 4 McLean, 424; *Prosser v. Tindall*, 80 Pa. St. 295; *Nelson v. Force*, 55 Ind. 455; *Nicholson v. Conner*, 8 Daly, 212; *Rider v. People*, 110 Ill. 11; *Marquette etc. R. R. Co. v. Kirkwood*, 45 Mich. 51; *Wohlfahrt v. Bechert*, 12 Abb. N. C. 478; S. C., 92 N. Y. 490, to the same point. An instruction therefore is erroneous which denies to the jury the right to consider the direct interest of a witness as a party to the suit in determining the weight to which his testimony is fairly entitled: *New Orleans etc. R. R. Co. v. Allbritton*, 38 Miss. 98; S. C., 75 Am. Dec. 98; or which instructs them, or suggests to them, that servants or agents of a party who are called as witnesses have any such interest as affects their testimony: *Marquette etc. R. R. Co. v. Kirkwood*, 45 Mich. 51; or that the weight to be given to the testimony of the plaintiff and defendant, as witnesses, depends upon the interest each may have in the result of the suit: *Dodd v. Moore*, 91 Ind. 522; or that if the witness is interested in the result of the prosecution, this tends to discredit him: *Pratt v. State*, 56 Id. 179; or that one interested will not usually be as honest and candid as one not so: *Featch v. State*, 56 Id. 584. The same rule applies to the relationship of a party to the cause: *Nelson v. Force*, 55 Id. 455. On the other hand, an instruction charging a jury that the testimony of witnesses who have no interest in the result of the suit, of equal credibility otherwise, is entitled to more weight than that of interested witnesses, has been held not erroneous; but the court disapproved it as being liable to mislead the jury: *Bonnell v. Smith*, 53 Iowa, 281.

3. *Testimony of Accomplices and Witnesses of Bad Reputation*, when once in a case, must be weighed by the jury for what it is worth. The testimony of an accomplice is to be viewed with suspicion, but if credited by the jury will support a verdict: *Finley v. Hunt*, 56 Miss. 221; *Moses v. State*, 58 Ala. 117. And the testimony of a witness whose reputation for truth is shown to be bad is not necessarily to be entirely disregarded, and an instruction to that effect would be erroneous: *State v. Miller*, 53 Iowa, 209. It is a question of credibility. All testimony, when once admitted in the cause, is, in general, for the jury to consider, whether it be that of an accomplice in crime, or of a person discredited as to his general character, or not strictly regardful of the truth. The most that the judge can do is to caution them to weigh such testimony with care and close scrutiny: *Pease v. Smith*, 61 N. Y. 483, citing the principal case; *State v. Miller*, 53 Iowa, 209; *Rider v. People*, 110 Ill. 11; *Mack v. State*, 48 Wis. 271.

4. *Witness whose Credibility is Impeached* is still competent, and his testimony must be weighed by the jury: *Lee v. Chadsey*, 2 Keyes, 543; *Smith v. Grimes*, 43 Iowa, 356; *Rider v. People*, 110 Ill. 11; *Gibson v. Troutman*, 9 Bradw. 94; *Allis v. Leonard*, 58 N. Y. 288; *Pennsylvania Co. v. Conlan*, 101 Ill. 95; *Brett v. Catlin*, 47 Barb. 404; and it is beyond the authority of the court to instruct the jury to disregard it in case they believe the witness has

been successfully impeached: *Chester v. State*, 1 Tex. App. 702. So is it erroneous to instruct the jury that the testimony of an impeached witness is of no value except when fully corroborated: *Green v. Cochran*, 43 Iowa, 544. The testimony of a witness who contradicts himself, or who is impeached by the testimony of others, cannot be rejected by the court: *Place v. Minster*, 65 N. Y. 103; *Clevenger v. Curry*, 81 Ill. 432; *Bowers v. People*, 74 Id. 418; *Roach v. People*, 77 Id. 25.

5. *Rules concerning Maxim, Falsus in Uno, Falsus in Omnibus.* See extended note to *Robertson v. Dodge*, 81 Am. Dec. 270. This maxim should only be applied where a witness has willfully and knowingly given false testimony on a point material to the issue: *Smith v. Forbes*, 14 Ill. App. 477; *Lemmon v. Moore*, 94 Ind. 41; *Gibson v. Troutman*, 9 Ill. App. 94; *Swan v. People*, 98 Ill. 610; *State v. Peace*, 1 Jones, 251; *Chicago etc. R. R. Co. v. Boger*, 1 Bradw. 472; *Brennan v. People*, 15 Ill. 511; *Giltner v. Gorham*, 4 McLean, 424; *Crabtree v. Hagenbaugh*, 25 Ill. 233; *People v. Strong*, 30 Cal. 151; *Goring v. Outhouse*, 95 Ill. 346; *Callanan v. Shaw*, 24 Iowa, 441; *Vicksburg etc. R. R. Co. v. Hedrick*, 62 Miss. 28; *State v. Mix*, 15 Mo. 153; *State v. Schoenwald*, 31 Id. 147; *Pope v. Dodson*, 58 Ill. 360. And in conformity with this maxim the jury may be instructed that, if any witness has willfully sworn falsely as to a particular fact, they may, but are not compelled to, discredit his whole testimony: *Frierson v. Galbraith*, 12 Lea, 129; *Crabtree v. Hagenbaugh*, 25 Ill. 233; S. C., 79 Am. Dec. 324; *People v. Soto*, 59 Cal. 367; *Quinn v. Rawson*, 5 Bradw. 130; *O'Rourke v. O'Rourke*, 43 Mich. 58; *People v. Sprague*, 53 Cal. 491; *People v. Hicks*, 53 Id. 354; *Gulliver v. People*, 82 Ill. 145; *Gottlieb v. Hartman*, 3 Col. 53; *Chambers v. People*, 105 Ill. 409; *Smith v. Forbes*, 14 Bradw. 477; *Brennan v. People*, 15 Ill. 516; *Ivey v. State*, 23 Ga. 576; *People v. Strong*, 30 Cal. 151; *Knowles v. People*, 15 Mich. 408; *Gillett v. Wimer*, 23 Mo. 77; *State v. Schoenwald*, 31 Id. 155; *Dell v. Oppenheimer*, 9 Neb. 454; *Roth v. Wells*, 29 N. Y. 471. But in some cases it is held inaccurate to instruct a jury that if they believe a witness has willfully and knowingly sworn falsely as to any material point in controversy they may disregard his entire testimony, without the qualification that the witness was uncorroborated by other evidence: *Blanchard v. Pratt*, 37 Ill. 243; *Goeing v. Outhouse*, 95 Id. 346; *Gulliver v. People*, 82 Id. 145; *Pope v. Dodson*, 58 Id. 360; *United States Ex. Co. v. Hutchins*, 58 Id. 44; *Rider v. People*, 110 Id. 11; *Crabtree v. Hagenbaugh*, 25 Id. 233; S. C., 79 Am. Dec. 324; *Quinn v. Rawson*, 5 Bradw. 130. But the maxim, *Falsus in uno, falsus in omnibus*, does not apply to cases where the witness is innocently mistaken: *People v. Strong*, 30 Cal. 151; or has made some inadvertent statement, etc.: *People v. Soto*, 59 Id. 369; *Brennan v. People*, 15 Ill. 516; *Koehucke v. Ross*, 16 Abb. Pr., N. S., 345, with a two-page note; *Crabtree v. Hagenbaugh*, 25 Ill. 233; S. C., 79 Am. Dec. 324; *Giltner v. Gorham*, 4 McLean, 424; *State v. Ellins*, 63 Mo. 159; and an instruction to disregard the whole of a witness's testimony, and founded upon an innocent mistake in his testimony, would be wrong: See cases last cited. It is thus seen that the maxim, *Falsus in uno, falsus in omnibus*, is, in a common-law trial, to be applied by the jury according to their own judgment for the ascertainment of the truth, and is not a rule of law in virtue of which the judge may withdraw the evidence from their consideration, or direct them to disregard it altogether: *Mead v. McGraw*, 19 Ohio St. 55, overruling *Stoffer v. State*, 15 Id. 47, and *Hargraves v. Miller's Adm'x*, 16 Ohio, 338, on this point; *State v. Smith*, 8 Jones, 132; *State v. Brantly*, 63 N. C. 518; *Pierce v. Selleck*, 18 Conn. 321; *Lewis v. Hodgdon*, 17 Me. 267. It is not a conclusive presumption of law, but only an advisory suggestion to the jury, which warns them to re-

cessive testimony false in one particular with caution, and warrants them in rejecting it altogether: *Finley v. Hunt*, 56 Miss. 221.

It is true that there are a few exceptional cases to this rule, most noticeable of which are *State v. Williams*, 2 Jones, 257, and *Hargraves v. Miller's Adm'r*, 16 Ohio, 338, in the former of which Battle, J., held that where a witness has willfully perjured himself in the oath taken on the trial then in progress, in any one particular, the court should instruct the jury, as a rule of law, that his whole testimony should be disregarded. But other cases cited above show that this is not law even in North Carolina. The old rule, *Falsus in uno, falsus in omnibus*, was apparently founded upon the rule that the person who had been indicted and convicted of willful perjury was not a competent witness in any case; and the courts, in analogy to this rule, were inclined to hold that when it appeared in the course of the trial that a witness had been guilty of perjury, his testimony ought to be excluded in the same manner as though he had been indicted and convicted of such perjury. But the rule that the person convicted of perjury is not a competent witness has been abolished by statute in many of the states, and his competency restored. His credibility is therefore necessarily a question for the jury; and it would seem to follow that the witness who may have made false statements under oath, of which he had not been formally convicted, would not thereby become an incompetent witness for all purposes any more than the witness who had been convicted of perjury, and his credibility must also be left to the jury, under all the circumstances connected with his testimony, for them to believe or disbelieve, as they deem it worthy or unworthy of belief: *Mack v. State*, 48 Wis. 236; *Schnek v. Hagar*, 24 Minn. 339; *Mercer v. Wright*, 3 Wis. 645; *People v. Soto*, 59 Cal. 369; *Pennsylvania Co. v. Conlan*, 101 Ill. 95; *Pease v. Smith*, 61 N. Y. 483; *Brett v. Catlin*, 47 Barb. 404; *Rafferty v. People*, 72 Ill. 37; *Miller v. Stern*, 12 Pa. St. 383; *Warren v. Haight*, 62 Barb. 490, citing the principal case; *Swan v. People*, 98 Ill. 610; *Chambers v. People*, 105 Id. 409; *Rider v. People*, 110 Id. 11; *Place v. Minster*, 65 N. Y. 103, citing the principal case; *Deering v. Metcalf*, 74 Id. 504, citing the principal case; *White v. McLean*, 47 How. Pr. 199, citing the principal case; *Blanchard v. Pratt*, 37 Ill. 248; *Lavenburg v. Harper*, 27 Miss. 299; *Parsons v. Huff*, 41 Me. 410. The question of credibility, however, should in all cases be submitted to the jury, under proper instructions and cautions from the court where necessity exists: *Mack v. State*, 48 Wis. 271; *Nelson v. Vorce*, 55 Ind. 455; *Pierce v. Selleck*, 18 Conn. 321; *Roth v. Wells*, 29 N. Y. 471. Thus where the witness has willfully sworn falsely to a material fact, the court can only caution the jury to weigh the testimony with care and close scrutiny: *Pease v. Smith*, 61 Id. 477. The instructions should be advisory merely, and not put in the form of a direction as matter of law. They must also be accompanied by explicit instructions that it is the duty of the jury to consider the evidence and decide thereon: *Allis v. Leonard*, 58 Id. 288. The jury may, however, be told that evidence was improperly admitted, and that they are not to consider it: *Pacey v. Burch*, 26 Am. Dec. 682; *Northampton Bank v. Balliet*, 42 Id. 297.

CITY BANK OF NEW HAVEN v. PERKINS.

[29 NEW YORK, 554.]

NO MAN CAN ACQUIRE RIGHT BY HIS OWN FRAUD TO SUSTAIN ACTION IN ANY COURT.

ACTION ON NOTE OBTAINED BY FRAUD MAY BE DEFEATED ON THAT GROUND, if a defendant can show that the plaintiff obtained the note by his own fraudulent act, although he may be liable to pay the note to the true owner.

FINDER OF NEGOTIABLE PAPER, OR THIEF WHO STEALS IT, ACQUIRES NO TITLE, although either may transfer a good title to a *bona fide* purchaser, and the same rule probably applies to the case of one obtaining such paper through any positive breach of the law.

NOTHING SHORT OF ACTUAL MALA FIDES OR NOTICE THEREOF WILL ENABLE MAKER OR INDORSER OF NEGOTIABLE PAPER TO DEFEAT ACTION THEREON brought by one who is apparently a regular indorsee or holder, especially where there is no defense as to the indebtedness.

DEFENDANT WHO OWES DEBT HAS NO INTEREST BEYOND BONA FIDES OF HOLDER.

CASHIER IS ONLY PERSON WHO CAN TRANSFER NEGOTIABLE PAPER BELONGING to the bank. But he being the financial officer of the bank, his authority to make such transfer *ex officio* for a legitimate purpose is undoubted.

TO ACTION ON BILLS OF EXCHANGE DRAWN OR ACCEPTED BY DEFENDANT, HE CANNOT INTERPOSE DEFENSE that the same were the property of a bank, and were transferred or pledged to the plaintiff as security for a loan by the cashier, who had no authority to so transfer or pledge them.

IT IS ENOUGH IN ACTION ON BILLS OF EXCHANGE THAT PLAINTIFF'S TITLE IS GOOD AS AGAINST DEFENDANT. If any others claim title to the bills superior to that of plaintiff, it can be determined whenever they come before the court to assert it.

NO PEOPLE ARE BOUND TO ENFORCE OR HOLD VALID IN THEIR COURTS OF JUSTICE ANY CONTRACT which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates a public law.

ACTION on two bills of exchange of ten thousand dollars each, indorsed by the defendant, and two other bills of five thousand dollars each, accepted by him. These bills were dated in August and September, 1854. Defendant denied his indebtedness, denied that the plaintiffs were the lawful holders and owners of said bills, and alleged that the bills belonged to the Bank of Akron, in the state of Ohio, or to its legal representative, the State Bank of Ohio. It appeared upon the trial that the defendant was indebted upon the bills, and the only question was, whether the plaintiffs were legitimate holders. The facts showed that in July, 1851, J. W. McMillan, cashier of the Bank of Akron, applied to the president of the plaintiffs' bank in the state of Connecticut for a loan by the latter bank to the Bank of Akron of fifty thousand dollars; and that

the loan was agreed to be made upon terms and conditions as follows: The loan was to be made in the bills of the plaintiffs' bank. The amount advanced was to be secured by the notes of McMillan individually, and indorsed by him as cashier, and also by a pledge of the discounted bills of the Bank of Akron, to be placed in the American Exchange Bank of the city of New York for collection. The Bank of Akron was to pay four per cent per annum interest on the amount of the loan, and protect the plaintiffs and the bills thus issued by a credit in the American Exchange Bank to the account of the plaintiffs, on being advised each week of the amount of bills redeemed by the plaintiffs. The bills were to be sent by express from New York, in parcels, to the address of McMillan, cashier of the Bank of Akron, at the risk and expense of the bank last named. The bills were sent according to agreement, in packages, commencing in August, 1851, and ending in January, 1852, when the whole amount of the loan had been sent. The packages were received and receipted for by McMillan as cashier, who made his notes, indorsed them according to the agreement, and sent them to the plaintiffs as each package was received. About September 26, 1857, the cashier of the American Exchange Bank was notified that fifty thousand dollars of the collection paper of the Bank of Akron, held by the American Exchange Bank at any time, was pledged to the plaintiffs, and that it had been agreed that the amount of such collection paper should at no time be less than the indebtedness of said Bank of Akron to the plaintiffs. On January 12, 1852, a similar notice was addressed to the cashier of the American Exchange Bank, stating that sixty thousand dollars of the collection paper of the Bank of Akron was pledged as security for the loan of fifty thousand dollars, and that it had been agreed that the amount of collection paper in the American Exchange Bank to be held for that purpose should at no time be less than that amount so long as said indebtedness should exist. After the fifty-thousand-dollar loan had been completed, the McMillan notes were surrendered by the plaintiffs, and a new note for the whole amount of fifty thousand dollars, signed by McMillan, and payable to his order as cashier, and indorsed, was delivered and accepted in lieu of the notes surrendered. This note bore interest at four per cent, payable semi-annually. Up to October 24, 1854, thirty thousand dollars of the principal of this note had been paid, and all the interest thereon. The arrangement had been con-

tinued up to this time, and the weekly redemptions regularly provided for with the funds of the Bank of Akron. The Bank of Akron, however, shortly after this date failed to provide funds in the American Exchange Bank to meet the redemption of the bills loaned; and on November 11, 1854, the plaintiffs demanded and received from the cashier of the last-named bank the notes in question, which had been deposited there for collection by the Bank of Akron. These notes had been regularly discounted by the Bank of Akron, and sent forward for collection to the American Exchange Bank, where they were made payable. After plaintiffs received the notes they were left at the bank last named for demand and protest, and were finally sent to the plaintiffs about December 4, 1854, duly indorsed. The Bank of Akron committed an act of insolvency on November 23, 1854, and according to the laws of Ohio all its property and assets vested in the State Bank of Ohio. It appeared that the other officers of the Bank of Akron were wholly ignorant of this loan from the plaintiffs, and of the arrangements made for securing it, until a short time previous to the failure of the bank. The evidence tended to show that McMillan, on pretense of obtaining a loan for the bank, had effected it on his own account; that he had used the funds for his own purposes; that he had entered only a very small portion of the transactions between the two banks on the books of his own bank; and that the money received from the plaintiffs was credited to his individual account as it was received at the bank, and applied to his own individual use. It also appeared that McMillan had wrongfully appropriated a large amount of the funds of the bank to his own use; that the packages of money sent directed as aforesaid were all received at the bank, opened and counted by the teller, put into the bank safe, and paid out at its counter; that the letters sent to McMillan, cashier, on the subject of the loan, were all received at the bank by the cashier or teller, whichever was present, and opened, read, and filed with the other correspondence of the bank; that McMillan was the principal financial officer of the bank; that he had the sole management and control of its affairs at and before the time of making the said loan, and up to a short time before the failure of the bank, when he resigned by reason of the discovery of his fraud; that the president was in the habit of doing business at the bank, but made no investigation into its affairs, or inquiry as to the manner in which its business was conducted; and that the

board of directors met twice in each year, in January and July, but made no examinations, trusting entirely to the cashier. Defendant's evidence tended to show that the cashier had no authority to pledge the assets of the bank without the consent of the board of directors. A new cashier was appointed in McMillan's place, upon the discovery of his fraud and his resignation. The bank then gave notice to the plaintiffs that it did not sanction the loan, and would hold them responsible for the money and the bills in question. It further appeared on the trial that by a statute of the state of Ohio, in force when the loan was made and the money sent, it was unlawful for any bank in that state to issue, pay out, or give in exchange for other money, so as to go into circulation in that state, any circulating notes or bills except the notes or bills of the banks of that state issued according to law. This statute also provided that all contracts, promises, and agreements, founded in whole or in part upon the payment, exchange, or putting forth of such bank notes contrary to the provisions of the act, should be held and adjudged utterly null and void. At the time of making the loan, the plaintiffs had no knowledge of this statute. The written proposition of the cashier, McMillan, which was accepted by the plaintiffs for the loan of their bank issues, contained no provision or stipulation regarding the place where the bills were to be paid out or circulated; but in his testimony, the plaintiffs' cashier stated that the inducement to their bank to make the loan at so low a rate of interest was the circulation of their bills; that the agreement was, that the notes should be circulated in Ohio; and that as the plaintiffs' bank redeemed them, the said bank was to be reimbursed for their redemption. The defendant moved for a dismissal of the complaint, after the plaintiffs had rested, upon the ground that the plaintiffs had shown no legal title to the bills in question, even if they were creditors of the bank; and that McMillan was the principal debtor, and had no authority to indorse for the bank, or to pledge its assets, either for the debts of the bank or for his own debts. The motion was denied, and the defendant's counsel excepted. The jury were directed to find a verdict for the plaintiffs for the face of the bills and interest, which was accordingly returned for \$36,541.95. Defendant made a case with exceptions, and moved at the general term for a new trial. This motion was denied, and judgment ordered for the plaintiffs. Defendant appealed.

C. C. Langdell, for the appellant.

B. W. Bonney, for the respondents.

By Court, JOHNSON, J. In the view I take of this case, it is wholly unnecessary to inquire whether the contract between the plaintiffs and McMillan, the cashier of the Bank of Akron, in pursuance of which the bills in question were indorsed to plaintiffs, was in all respects valid and binding upon said bank, as between it and the plaintiffs. The Bank of Akron is not a party to the action, nor is its legal representative, the State Bank of Ohio. The defendant claims no title to the paper, and does not pretend to have any interest in it, except as a promisor, liable to pay to any proper holder. There is no party before the court who has any legitimate interest in questioning the plaintiffs' title, or who has, as it seems to me, under the circumstances of this case, any right to be heard on that question. There is no connection shown between the defendant and the State Bank of Ohio, which represents the Bank of Akron. It is not shown or pretended that the defendant has been forbidden to pay the bills to the plaintiffs, or even requested not to do so; and for aught that appears, the State Bank of Ohio acquiesces in the plaintiffs' claim of title to these obligations. It is of no consequence whatever that the Bank of Akron undertook to repudiate the transaction by giving notice to the plaintiffs before its insolvency. All its rights, as the case shows, are now vested in the State Bank of Ohio, and the latter bank may, upon better advisement, conclude never to contest the plaintiffs' claim. The legal presumption is, that it does not intend to do so, as the contrary is not shown. The defendant stands here therefore as a mere volunteer, in behalf of others not before the court, and who make no claim on their own account. Confessedly he owes the debt. He has no defense whatever on his own account, and should he succeed in defending on the grounds on which the litigation seems thus far to have proceeded, he may escape the payment of a just debt altogether. This the court should not allow in a case like this, except upon clear and well-established grounds. It will be time enough to determine whether any other person has a better title, when such person shall come before the court to claim the bills in question, or their proceeds, from the plaintiffs. Upon what grounds, then, can the defendant, as a mere debtor, be permitted to defeat the action? It has been held that if a defendant can show

that the plaintiff obtained the note by his own fraudulent act, he has a right to defeat the action on that ground, although he may be liable to pay the note to the true owner: *Talman v. Gibson*, 1 Hall, 308. Oakley, J., in delivering the opinion in that case, says: "This proceeds on the general doctrine that no man can acquire a right, by his own fraud, to sustain an action in any court; and it is a principle of general application." In that case, however, it appears that the defense was set up for the defendant by one Hyslop, who claimed to be the true owner of the note, and had demanded it of the plaintiff. The same principle was adopted by this court in *Houghton v. McAuliffe*, 26 How. Pr. 270, decided at the last December term. The action was against the makers, who refused to pay, on the ground of the illegality of the transfer to the plaintiff. It was held that the transfer of the note was contrary to the statute, and that the party who transferred it to the plaintiff was guilty of a criminal offense in obtaining the note, and could transfer no title to any one having notice that it belonged to another; and that the plaintiff, under the circumstances, must be deemed to have notice that the note belonged to the company to which it was given, and not to the person of whom he purchased it.

And so the finder of negotiable paper, or the thief who steals it, acquires no title, although either may transfer a good title to a *bona fide* purchaser: 2 Parsons on Notes and Bills, 265-270, inclusive, and cases there cited. The same rule would, I suppose, apply to the case of one obtaining such paper through any positive breach of law. But as I understand the rule, nothing short of actual *mala fides*, or notice thereof, will enable a maker or indorser of such paper to defeat an action brought upon it by one who is apparently a regular indorsee or holder; especially where there is no defense as to the indebtedness.

This rule is founded in the most obvious dictates of reason and sound policy, and should be inflexibly maintained. As to anything beyond the *bona fides* of the holder, the defendant, who owes the debt, has no interest. This was held in *Gage v. Kendall*, 15 Wend. 640. The defense in that case was, that the plaintiff did not own the note, although he appeared to be the indorsee; and that the action had been commenced without his knowledge or consent, or any notice of or assent to the pretended transfer to him. But it was held that the owner had the right to fill up the blank indorsement with any name he pleased, and the person whose name was thus used would

be deemed on record as the legal owner; and that whether he was so in fact or not, he could sue as trustee for the real owner, and the defendant had no concern with the question. The court say it was not a case of *mala fide* possession, and remark: "Why should the defendant give himself the trouble to investigate the plaintiff's title? He owes the money to some one." The principle of that case applies here with full force. There is no ground for pretending that the plaintiff's possession is *mala fide*. Upon the face of the bills, their title is complete and perfect. They belonged to the Bank of Akron, and were regularly transferred to the American Exchange Bank by the indorsement of McMillan as cashier of the Bank of Akron. He was the financial officer of the latter bank, and the only person who could thus transfer them. His authority to make such transfer *ex officio* for a legitimate purpose is undoubted: Angell and Ames on Corporations, 296; 2 Parsons on Notes and Bills, 7; *Fleckner v. Bank of the United States*, 8 Wheat. 838.

I do not understand that any question is made in behalf of the defendant in respect to the validity of the transfer to the American Exchange Bank, nor but that the defendant might have been compelled, by action brought by that bank, to pay the amount of the bills. The point is, that the cashier had no authority to pledge the bills while there to the plaintiffs as a security for the loan, and therefore the transfer by that bank under the authority or by the direction of McMillan to the plaintiffs is void, and confers no title upon the latter. But it is very clear that the plaintiffs were acting in good faith,—all the time supposing and believing that they were, in fact, dealing with the Bank of Akron, and with no one else, and took the bills in question without any notice or suspicion of any fraudulent conduct or excess of authority on the part of McMillan, the cashier. That must be sufficient as against the defendant, who is without defense upon the obligations themselves. And even if it should be held, as between the Bank of Akron, or its legal representatives, and the plaintiffs, that the latter were bound to inquire into the authority of the cashier, and take notice of its extent (as to which I shall express no opinion), it is a question which in no way concerns the defendant, and upon which he cannot be allowed to defend, and escape the payment of his obligations. It is enough that the plaintiffs make out a title free from *mala fides* on their part, and which is every way sufficient for his protection. The

issue, beyond that between the parties before the court, is wholly immaterial; and if established against the plaintiffs, would constitute no defense to this action. The title is good as against the defendant, and that is sufficient. If there are any others who claim a title to the instruments superior to that of the plaintiffs, it can be determined whenever they come before the court to assert it.

The point that the whole transaction is void as a positive breach of the laws of the state of Ohio is untenable. The contract was not made in that state, and was not to be performed there; it was made in the state of Connecticut, and was to be performed there; and there is no pretense that it infringed any law of that state.

It was not an essential part of the contract that the bills of the plaintiffs' bank should be circulated in the state of Ohio. The borrower might have circulated them elsewhere, or withheld them from circulation altogether, without any violation of the contract. It is quite possible that the plaintiffs might not be able to enforce their contract in the courts of the state of Ohio. As a general rule, no people are bound to enforce or hold valid in their courts of justice any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates a public law: 2 Kent's Com. 458. Though I am inclined to the opinion that even there a contract of this kind would be enforced, notwithstanding their statute. It is quite certain that our courts would enforce it under similar circumstances against one of our own citizens. In this respect it would be analogous in principle to the cases of *Merchants' Bank of New York v. Spalding*, 9 N. Y. 53; and *Tracy v. Talmage*, 14 Id. 162 [67 Am. Dec. 132]. Certainly, it does not violate any law of Connecticut or of this state, and we could scarcely be expected to give any such extraordinary effect in our courts to a statute of Ohio as to hold that the contract cannot be enforced here.

My conclusion is, that the judgment is right, and should be affirmed.

All the judges concurring, judgment affirmed.

CAN ONE AVOID HIS CONTRACT FOR FRAUD IN WHICH HE PARTICIPATED? See extended note to *Powell v. Inman*, 82 Am. Dec. 428, 429, and extended note to *Boyd v. Barclay*, 34 Id. 765-767, on rights of parties to illegal or fraudulent transactions.

FRAUD IN OBTAINING NOTE IS DEFENSE IN ACTION THEREON: *Shepard v. Howley*, 6 Am. Dec. 244; *Proctor v. McCall*, 23 Id. 135; note to *Giles v. Wil-*

Nams, 37 Id. 694; *Hildreth v. Tomlinson*, 50 Id. 510; *Clem v. Newcastle etc. R. R. Co.*, 68 Id. 653; *Hamilton v. Scull's Adm'r*, 69 Id. 460; note to *Boyd v. Barclay*, 34 Id. 766.

BOHA FIDES AND CONSIDERATION MUST BE SHOWN BY HOLDER OF LOST OR STOLEN NOTES OR BILLS: *Beltshoover v. Blackstock*, 27 Am. Dec. 330; *Vairin v. Hobson*, 28 Id. 125; *Truly v. Lane*, 45 Id. 305; *Tuttle v. Standish*, 81 Id. 712. But a *bona fide* holder will be protected: *Stalker v. McDonald*, 40 Id. 389.

POSSESSION OF NOTE ACQUIRED BY FRAUD GIVES NO TITLE: *Proctor v. McCall*, 23 Am. Dec. 135.

POSSESSION OF NEGOTIABLE INSTRUMENT IS PRIMA FACIE EVIDENCE OF OWNERSHIP, and the holder as plaintiff is not bound to prove consideration, unless circumstances of suspicion appear: See collected cases in note to *Ellicott v. Martin*, 61 Am. Dec. 330; *Morris v. Foreman*, 1 Id. 235.

MALA FIDES MUST BE ALLEGED IN ACTION UPON BILL OF EXCHANGE, where plaintiff has it in his possession, before a court will inquire whether the party sues for himself or as trustee for another or into the right of possession: *Ellicott v. Martin*, 61 Am. Dec. 327.

CASHIER'S POWER TO TRANSFER PAPER OF BANK: *Everett v. United States*, 30 Am. Dec. 584; *Farrar v. Gilman*, 36 Id. 766; *Elliot v. Abbott*, 37 Id. 227; *Merchants' Bank of Macon v. Rawls*, 50 Id. 394; *Corser v. Paul*, 77 Id. 753, and extended note thereto 759-763, on implied powers of bank cashiers.

NO COUNTRY WILL ENFORCE CONTRACT MADE ELSEWHERE, if the enforcement would be to its injury: See note to *Smith v. Godfrey*, 61 Am. Dec. 622; in conflict with vested rights which have accrued under its domestic laws: *McLean v. Hardin*, 69 Id. 740; *Walters v. Whitlock*, 76 Id. 607; or where such contract is repugnant to the laws and policy of the country where it is sought to be enforced: *Roche v. Washington*, 81 Id. 376; *Kanaga v. Taylor*, 70 Id. 62; *Parsons v. Trask*, 66 Id. 502.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: Irrelevant allegations in an answer may be properly stricken out as such, where they constitute no defense to the action and have no bearing on the measure of damages: *Aubrey v. Fiske*, 36 How. Pr. 281; S. C., 36 N. Y. 48, to the same point. A party to an action has no right to defend on a question or matter in which he has no legitimate concern or interest; as where one acquires a note lawfully, but commits a breach of trust by refusing to redeliver it, he cannot, in an action by the rightful holders, who have temporarily pledged it for a loan to recover for the wrongful conversion of the note, set up the defense that a material alteration has been made in it after its execution, either as a bar to the action or to mitigate the damages. However material the alteration might be as to the makers when required to pay, it is wholly irrelevant and immaterial as between the parties to such action for any purpose: *Fleet v. Craig*, 59 Barb. 332. The same principle applies to one who occupies the position of a naked trespasser: *Van Etten v. Currier*, 3 Keyes, 331. Where the assignee of a demand is plaintiff, it is enough that he has legal title to the demand, if the defendant would be protected in a payment or recovery by the assignee. The consideration is of no moment. It is not a case of *mala fide* possession which the defendant can avail himself of, as if a thief should bring an action upon a promissory note which he had stolen: *Sheridan v. Mayor*, 68 N. Y. 32; and *Hays v. Hathorn*, 74 Id. 489; *Hays v. Southgate*, 10 Hun, 513; *Farswell v. Hübner*, 15 Id. 282, applying the same rules to actions upon notes, especially

when there is no defense as to the indebtedness. The principal case was approved in *Sandford v. Sandford*, 45 N. Y. 727; was similar to *Brown v. Penfield*, 36 Id. 475; but was not considered to be in point in *Eaton v. Alger*, 57 Barb. 191.

CREED v. HARTMANN.

[29 NEW YORK, 591.]

LIABILITY FOR PERSONAL INJURY OCCASIONED BY NEGLIGENCE OF SEVERAL PERSONS IS SEPARATE AS WELL AS JOINT.

BOTH OR EITHER OF TORT-FEASORS MAY BE SUED BY INJURED PARTY, at his election.

TORT-FEASORS NEED NOT ALL BE JOINED in action for injury. Their liability is separate as well as joint.

COMPLAINT SHOULD NOT BE DISMISSED AND NONSUIT GRANTED FOR CONTRIBUTORY NEGLIGENCE, unless the undisputed facts clearly show that which the law adjudges negligence.

PERSONS WHO, WITHOUT SPECIAL AUTHORITY, MAKE OR CONTINUE COVERED EXCAVATION IN PUBLIC STREET or highway, for private purpose, should be responsible for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use, there being no negligence by the parties injured. And it is immaterial whether the excavation was a covered or an open one, where it was made without authority, and the party injured was free from fault.

CONTRACTORS ARE LIABLE FOR NEGLIGENCE OF SUBCONTRACTORS, WHEN. —

Persons contracting with owner of lots to build block of houses thereon, and who sublet to one who agrees to make excavations, blast rocks, etc., and to make good all damages, are liable for an injury caused to an individual by his falling into an excavation in the sidewalk, through the negligence of the subcontractor, or his servants, in not having the same properly protected, where the original contractors have no authority from the city to make such excavation.

CONTRACTOR HAVING UNAUTHORIZED EXCAVATION MADE IN STREET IS LIABLE for an injury occasioned thereby to a passer-by, whether it was caused by the negligence of workmen or not.

BASIS OF CONTRACTOR'S LIABILITY, where he has procured an excavation to be made in a street or highway, without authority, is his own wrongful act in so doing, and not the negligence of the subcontractor, or his workman, in performing or guarding the work. Per Selden, J.

DEFENDANT was one of a firm who had contracted to build a block of houses on the Third Avenue, in New York City. The contractors sublet to one Brady, who agreed to make all the necessary excavations by digging the ground, blasting the rocks, etc. Brady was to guard against accidents by proper precautions, and he was to make good all damages. After the sidewalk was dug out, the same was covered with boards, but by whom did not appear. The defendant's foreman was in the habit of putting up guards at night. Mary Creed, one

of the plaintiffs, in passing over the platform, broke through and fell into the excavation, fracturing her thigh. Defendant moved for a nonsuit, upon the ground that Brady was the party guilty of negligence, if any; that the plaintiff was guilty of negligence; and that the partner of the defendant was a necessary party. This motion was denied. Verdict for plaintiffs, the judgment thereon being affirmed by the general term.

William R. Stafford, for the appellant.

A. L. Pinney, for the respondents.

By Court, INGRAHAM, J. There was not sufficient evidence of negligence on the part of the plaintiff to warrant the court to take the case from the jury. It did not appear that she had any reason to suppose the boards placed for people to walk over were not sufficient. On the contrary, she saw others passing, and as it was usual to make such bridges to pass over excavations in the sidewalks, she had no reason to suppose there was any difference in the present case. It is only where the negligence is clearly proved that the court is warranted in dismissing the complaint. The defendant was one of a firm who had the contract for erecting the buildings. Both of the parties were alike guilty of negligence, and both might have been sued for such negligence, but each of them was equally liable, if any liability existed; and there is no rule which makes both parties necessary parties to an action of this character. There was a separate liability as well as a joint one, and the plaintiff might at his election sue both or either of them: *Low v. Mumford*, 14 Johns. 426 [7 Am. Dec. 469].

The principal question in the case is, whether the defendant was liable for the negligence of Brady, who had the contract to do the work, and who made the excavations.

The cases of *Blake v. Ferris*, 5 N. Y. 48 [55 Am. Dec. 304], and *Pack v. Mayor etc.*, 8 Id. 222, decided that the principal was not liable for accidents to third persons, occasioned by negligence of the workmen, when the work had been contracted for to a third person to do the work at a stipulated price. The contractor, in such case, is not the agent of the employers, and they are not responsible for the contractor's negligence. The principle upon which these cases rest is, that the employer has no control over the men and servants employed by the contractor, and is not responsible for their negligence.

In *Storrs v. City of Utica*, 17 N. Y. 107 [72 Am. Dec. 437], the case of *Blake v. Ferris*, 5 Id. 48 [55 Am. Dec. 304], was reviewed, and Comstock, J., expressed his doubts about the propriety of that decision, and draws a distinction between one who directs a ditch to be dug in a highway, although he does the work by a contractor, and one who directs rocks to be blasted in a highway, and does that work under contract. I confess that I have difficulty in understanding how the employer in the one case is liable and not in the other. The digging of a ditch and the blasting of rocks in a public highway are both acts equally dangerous to the traveler, and equally call for care against accidents. The one renders the street unsafe for night travel, and the other during the day. That case seems to have been placed upon the decision of this court in *City of Buffalo v. Holloway*, 7 N. Y. 493 [57 Am. Dec. 550], where the court held the contractor was not liable to the city for negligence in leaving an opening in the street, because the contract did not require him to take precautionary measures against it. In *Storrs v. City of Utica*, 17 Id. 107 [72 Am. Dec. 437], Comstock, J., says: "If the work is done by contract, then I admit that the contractor must respond to third parties, if his servants or laborers are negligent in the immediate execution of the work." And again: "The employer may insert in that contract a clause that the contractor shall provide proper lights and guards, but I do not see how that can change the principle." "But this," he says, "has no tendency, in my judgment, to shield the ultimate superior or author of the work from responsibility."

In *Congreve v. Smith*, 18 N. Y. 79, the defendant was held responsible for work done in a public street, although it was shown that the work was done under a contract calling for the best materials, and that the work should be done in a good and workmanlike manner. Strong, J., says: "A person who makes or continues a covered excavation in a public street or highway for a private purpose should be responsible for all injuries to individuals resulting from the street or highway being less safe for use. . . . It is no answer to the action that the covering was done under the contractors who contracted to do the work properly, and that the defendants are not responsible for the negligence of the contractors' servants." It was no part of the contract to cover the opening, and the defendant may have reserved to do that work himself. Neither does it appear, as in *Blake v. Ferris*, 5 N. Y. 48 [55 Am. Dec. 304],

that the defendant had obtained permission to do this work in the public street. This would distinguish it from the case of *Blake v. Ferris, supra*, where a permission had been given to build the sewer in the street, by the corporation.

The judgment should be affirmed.

SELDEN, J. The verdict of the jury, under the appropriate charge of the court on the subject, is an answer to the position of the defendant's counsel, that the plaintiff was guilty of negligence. If the question were an open one, however, it would be very difficult to find in the evidence anything to justify a different verdict.

There is no well-grounded reason for questioning the defendant's liability in this case, under the rule laid down in the case of *Congreve v. Smith*, 18 N. Y. 79, that "persons who, without special authority, make or continue a covered excavation in a public street or highway, for private purposes, should be responsible for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use, there being no negligence by the parties injured." It cannot be material whether the excavation was a covered or an open one, where it was made without authority, and the party injured was free from fault.

The fact chiefly relied upon in the defendant's behalf, that the injury resulted immediately from the negligence of a contractor, who was doing the work upon his own responsibility, and was bound by his contract with the defendant to guard, by proper precautions, against accidents, does not constitute a defense to the action. The excavation was made on the defendant's account, and at his request, in a public street, for a private purpose of the defendant, in which the public had no interest, and, so far as the case discloses, without the consent of the corporate authorities. The act of making the excavation was wrongful, without reference to the manner in which it was made or secured. The defendant was therefore liable for the injury which the excavation produced to third persons, without fault on their part, whether the workmen were guilty of negligence or not: *Congreve v. Smith*, 18 N. Y. 79; *Dygert v. Schenck*, 23 Wend. 446 [35 Am. Dec. 575]; *Coupland v. Hardingham*, 3 Camp. 398. The basis of the defendant's liability is, his own wrongful act in procuring the excavation to be made without authority, and not the negligence of the contractor or his workmen in performing or guarding the work. In this respect there is a plain distinction between the present case

and those of *Blake v. Ferris*, 5 N. Y. 48 [55 Am. Dec. 304], *Pack v. Mayor etc.*, 8 Id. 222, and *Kelly v. Mayor etc.*, 11 Id. 432. In each of those cases the work was authorized by the corporate authorities, and was therefore rightful, if carefully and skillfully executed; and it was held that the defendant, not having any control over the manner in which it was done by the contractors, to whom its performance had been committed, was not responsible for their negligence or want of skill. If the work had been unauthorized, and was therefore in itself wrongful without reference to the manner in which it was performed, the defendants would undoubtedly have been held liable.

I do not think we are called upon to decide whether the defendant would have been liable for the negligence of the contractor in guarding the work if it had been done by license from the corporate authorities, upon the ground of the distinction taken in the case of *Storrs v. City of Utica*, 17 N. Y. 107 [72 Am. Dec. 437], between negligence in the actual making of the excavation and negligence in providing safeguards against injury from its existence. In that case it was held that a municipal corporation was liable for the injury produced by a neglect to place proper lights and guards at night about an excavation in a street, made in the construction of a public sewer, although the work was done by a contractor upon his own responsibility. There was no provision in the contract in that case requiring the contractor to guard against accidents, but Judge Comstock expresses the opinion (the correctness of which cannot well be doubted) that such provision would not have relieved the corporation from liability; and it may safely be assumed that an individual making an excavation in a street for his own benefit, with the consent of a municipal corporation, could not claim an immunity which the corporation itself would not possess if it were doing the same work for the benefit of the public. It was upon this ground that the judgment was sustained at the general term in the superior court; and if it were necessary to decide the question I should be prepared to concur in that view. There is, however, no evidence in the case of any express license to the defendant to make the excavation, and although a license might doubtless be inferred from circumstances (*City of Chicago v. Robbins*, 2 Black, 418), no proof was offered of any circumstances from which such inference could be drawn. The work itself was therefore wrongful, and the right of ac-

tion does not depend upon any negligence on the part of the contractor.

The ground upon which I have placed the liability of the defendant furnishes an answer to the objection that his partner (Eberspacher) should also have been made a defendant. The making of the excavation without license was a tort on the part of both the defendant and Eberspacher, and the liability for torts committed by more than one person is always several as well as joint: *Low v. Mumford*, 14 Johns. 426 [7 Am. Dec. 469].

I doubt whether the rule would be different if the liability of the defendant should be held to depend upon the negligence of the common agent of him and his partner: *Champion v. Bostwick*, 18 Wend. 185, 186 [81 Am. Dec. 376]. It is, however, a sufficient answer to the objection under consideration that it was not taken in the answer: Code of Procedure, secs. 144, 147, 148; *Bidwell v. Astor M. I. Co.*, 16 N. Y. 266. The facts on which the objection is based are stated in the answer for the purpose of exonerating the defendant by throwing the sole responsibility upon Brady, the contractor; but there was no suggestion of any defect of parties. This was necessary if the objection was sound in principle to make it available, and possibly the further allegation that Eberspacher was still living: *Cabell v. Vaughan*, 1 Saund. 291; 3 Ch. Pl., Springfield ed., 1844, 900, note *f*.

The judgment of the superior court should be affirmed.

All the judges concurring, judgment affirmed.

JOINT AND SEVERAL LIABILITY OF TORT-FEASORS: *Richardson v. Emerson*, 62 Am. Dec. 694; note to *Blann v. Crocheron*, 54 Id. 206; *Klauder v. McGrath*, 78 Id. 829.

TORT-FEASORS, — PLAINTIFF MAY PROCEED AGAINST ANY OR ALL, AT HIS ELECTION: See note to *Blann v. Crocheron*, 54 Am. Dec. 206.

NONSUIT FOR CONTRIBUTORY NEGLIGENCE SHOULD BE GRANTED, WHEN: *Warren v. Fitchburg R. R. Co.*, 85 Am. Dec. 700; *Snow v. Housatonic R. R. Co.*, 85 Id. 720; *Todd v. Old Colony etc. R. R. Co.*, 83 Id. 679; *Milwaukee etc. R. R. Co. v. Hunter*, 78 Id. 699, and notes to these cases.

CONTRACTOR'S LIABILITY FOR NEGLIGENCE IN MAKING STREET EXCAVATIONS, LEAVING THEM UNGUARDED, ETC.: See note to *James v. San Francisco*, 65 Am. Dec. 528; extended note to *Sparhawk v. City of Salem*, 79 Id. 702-705, on liability of individuals or towns for injuries arising from excavations at roadside, by reason of failure to maintain fences or guards; note to *Lowell v. Boston etc. R. R. Corp.*, 34 Id. 40; *Boswell v. Laird*, 68 Id. 345.

EMPLOYER'S LIABILITY FOR ACTS, OMISSIONS, OR NEGLIGENCE OF CONTRACTOR IN MAKING EXCAVATIONS, or in constructing public works, and

leaving the same in an unsafe and unguarded condition: *City of Detroit v. Casey*, 80 Am. Dec. 78, and collected cases in note thereto 82, 83; *Sparkman v. City of Salem*, 79 Id. 700, and extended note thereto 702-704, on the liability of individuals or towns for injuries arising from excavations at roadside by reason of failure to maintain fences or guards; *Storrs v. City of Utica*, 72 Id. 437; *Clark v. Fry*, 72 Id. 590; *City of St. Paul v. Seitz*, 74 Id. 753; *James v. San Francisco*, 65 Id. 528; *Bessell v. Laird*, 68 Id. 345, and note 350; note to *Hilliard v. Richardson*, 63 Id. 757; note to *Charles v. Rankin*, 66 Id. 650; note to *City of St. Paul v. Seitz*, 74 Id. 761, 762, on the liability of a city as affected by employment of contractor; and extended note to *Stone v. Chesire R. R. Corp.*, 51 Id. 200-206, on employer's liability for acts of contractor; *Bracelet v. Subke*, 81 Id. 694, and note 696.

CONTRACTOR'S LIABILITY FOR ACTS OF SUBCONTRACTOR: See note to *Stone v. Chesire R. R. Corp.*, 51 Am. Dec. 201.

CONTRACTOR'S OR OWNER'S LIABILITY FOR DAMAGE OCCASIONED BY WRONGFUL ACTS OF PERSONS EMPLOYED BY SUBCONTRACTOR or under-workman: See *McGuire v. Grant*, 67 Am. Dec. 49.

CITY EMPLOYING CONTRACTOR TO GRADE STREET IS LIABLE FOR NEGLIGENCE OF HIS EMPLOYEES in leaving excavation unguarded: *City of St. Paul v. Seitz*, 74 Am. Dec. 753.

EXCAVATION OF HIGHWAY WITHOUT AUTHORITY RENDERS PERSON RESPONSIBLE FOR WORK LIABLE FOR DAMAGES to one who, using due care, falls in and is injured: *Congress v. Morgan*, 72 Am. Dec. 495.

SERVANTS OF CONTRACTOR AND THOSE OF SUBCONTRACTOR ARE NOT CO-SERVANTS: *Murray v. S. C. R. R. Co.*, 26 Am. Dec. 289.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: Persons who, without special authority, make or continue a covered excavation in a public street or highway, for a private purpose, should be responsible for all injuries to individuals resulting from the street or highway being less safe for its appropriate use, there being no negligence by the party injured: *Stephani v. Brown*, 40 Ill. 433; *Osborn v. Union Ferry Co.*, 53 Barb. 642. It is a well-settled rule that a person who interferes in any way with a sidewalk in a city, and leaves it in a dangerous condition, is liable for injuries caused thereby, whether he knew it to be dangerous or not, and irrespective of any permission from the public authorities to do the work from which the injury arises: *Sexton v. Zett*, 56 Id. 121; S. C., 44 N. Y. 432, and to the same point. In fact, an unauthorized excavation in a street may be treated as a nuisance. It is wrongful, and the party who continues it, or who is responsible for it, is liable to all persons injured thereby, irrespective of any question of negligence: *Irvine v. Wood*, 51 Id. 228; *Mairs v. Manhattan Real Estate Ass'n*, 89 Id. 503; *Osborn v. Union Ferry Co.*, 53 Barb. 642; *Stephani v. Brown*, 40 Ill. 433; *Clifford v. Dam*, 12 Jones & S. 392; *Irvin v. Wood*, 4 Robt. 143; *Gardner v. Bennett*, 6 Jones & S. 200; *Lowery v. Brooklyn City etc. R. R. Co.*, 4 Abb. N. C. 36. And it is a nuisance whether the hole is covered or uncovered: *Irvin v. Wood*, 4 Robt. 143; and it is immaterial whether it was made under contract or otherwise: *Gardner v. Bennett*, 6 Jones & S. 200. More than one party, too, may be liable in such a case. Both the person who procured the nuisance to be made and the immediate author of it are liable: *Water Co. v. Ware*, 16 Wall. 577; *Baxter v. Warner*, 6 Hun, 586; *McCafferty v. Spuyten etc. R. R. Co.*, 61 N. Y. 200; *Town of Pierrepont v. Lovelass*, 4 Hun, 700. A wrong-doer cannot shake off responsibility by interposing between himself and the injured party the act of a contractor: See

cases last cited. The liability of several persons for creating or continuing such a nuisance, or other wrong, is both several and joint, and the plaintiff may, at pleasure, sue one or all of the wrong-doers: *People v. Tweed*, 5 Hun, 389; *Irvin v. Wood*, 4 Robt. 146; *Kain v. Smith*, 11 Hun, 556; *Wood v. Luccomb*, 23 Wis. 290. For every injury happening by reason of one's neglect to perform his duty, he is liable as for a tort, and this is so whether the act or omission causing it was due to his personal neglect or the neglect of an agent employed by him, and whether there are one or more parties concerned as operators or employers can make no difference. The liability is several as well as joint: *Kain v. Smith*, 80 N. Y. 468. But having chosen as many actions as there are wrong-doers, he cannot multiply his damages. He may have a verdict and judgment in each action, but he can have only one satisfaction, and that will be operative as to all: *Lord v. Tiffany*, 98 Id. 421. It must be observed, however, that the wrong done in the principal case was a joint act; and it must be distinguished from cases where the separate negligence of two parties combine to produce the injury. That is, the negligence of one would not have caused the injury had it not been for the negligence of the other: *Chipman v. Palmer*, 9 Hun, 519; S. C., 77 N. Y. 54. So, too, the fact that it is difficult to separate the injury done by each one from the others furnishes no reason for holding that one tort-feasor should be liable for the acts of others with whom he is not acting in concert: *Chipman v. Palmer*, 77 N. Y. 54. Cases in which personal injury is occasioned by the separate and concurring negligence of two or more parties must be distinguished from those where persons are severally contributing to a nuisance: Id. The authorities also establish a distinction between an action for a wrong and an action for negligence: *Dickinson v. Mayor etc. of City of New York*, 92 Id. 585. A city which has authorized an excavation in a street must take special precautions to have it lighted and guarded, where danger from it cannot otherwise be averted: *Parker v. City of Cohoes*, 10 Hun, 536. It may be regarded as now in accordance with the uniform tenor of the recent English cases, and those in our courts, that the general question of negligence of the defendants, and the contributory negligence of the plaintiff, are exclusively within the province of the jury: *Pendril v. Second Av. R. R. Co.*, 43 How. Pr. 411; S. C., 2 Jones & S. 486, to the same point; *Bateman v. Ruth*, 3 Daly, 385.

ROOT v. WAGNER.

[30 NEW YORK, 2.]

PARTY IN WHOSE FAVOR PROCESS ISSUES MAY GIVE SUCH INSTRUCTIONS TO SHERIFF as will not only excuse him from his general duty, but bind him to the performance of what is required of him.

PLAINTIFF IN JUDGMENT, OR HIS ASSIGNEE, MAY DIRECT ALL OR PART THEREOF TO BE MADE OUT OF PROPERTY of any of the defendants, where a judgment has been recovered against several defendants, and execution issued against all; and the sheriff is liable if he refuses to comply with the directions.

ACTION to recover a part of a judgment owned by the plaintiff, upon which execution had been issued and delivered to the defendant, as sheriff. The cause was tried before a referee.

who found the following facts: The Bank of Genesee recovered a judgment against Alva Clarke, Joseph Ketchum, Theodore F. Sharpe, and Nelson Thompson, upon which an execution was issued and delivered to the defendant, who levied upon personal property of all of the defendants in execution, except Thompson. After the levy, the judgment was assigned to the plaintiff, who directed the defendant to let the sale of Ketchum's property go down, but to hold on to the levy as to the property of Clarke and Sharpe, and to make two thirds of the judgment out such property. The defendant refused to obey this direction. The referee found that the plaintiff was entitled to recover the two thirds of the amount of the original judgment, with interest thereon from the time it was docketed. The judgment upon the report of the referee was affirmed at a general term of the supreme court, and the defendant appealed.

F. Kernan, for the appellant.

D. B. Prosser, for the respondent.

By Court, DAVIES, J. The sheriff has refused to obey the directions of the plaintiff in reference to the execution in his hands, and has defended this action upon the theory that he was under no obligations to conform his action to such directions. In this he is clearly in error. The party in whose favor process issues may give such instructions to the sheriff as will not only excuse him from his general duty, but bind him. Both the process and the law which convey authority under it are for the benefit of the party in whose behalf it is issued, and it is a general rule that a man may dispense with an entire law which is intended for his aid or protection. It follows that he may qualify it, to a greater or less extent, according to his discretion: *Walters v. Sykes*, 22 Wend. 566. In the present case this plaintiff, as soon as he became the owner of the judgment, became the real plaintiff therein, and in the execution issued to enforce the collection thereof. Both thereafter were to be employed for his benefit, and were under his control, and those charged with the execution of the process thereon were as much subject to his directions as if he had been the original plaintiff in the judgment. Almost the precise point arising here was presented in the case of *Godfrey v. Gibbons*, 22 Id. 569. The plaintiff in that case had a judgment against two persons by the name of Gibbons, and one Wiswall. He issued an execution thereon, directing the sheriff to levy the money of

the defendants Gibbons; but the sheriff, acting under their advice, made a levy on the property of the defendant Wiswall only. The plaintiff then withdrew the first execution and issued another, which was levied upon the property of the defendants Gibbons, according to the directions of the plaintiff. It was shown by affidavits that, as between the Gibbonses and the other defendants, those defendants ought to pay the debt. This depended on the state of the accounts between the defendants. The defendants Gibbons moved to set aside the last execution, and took the ground that the levy on the property of the defendant Wiswall, under the first execution, and which the plaintiff had released by its countermand, had satisfied the judgment. The supreme court denied the motion, and said they had nothing to do with the state of the accounts between the defendants. The plaintiff, not the defendants, or any of them, had a perfect right to direct a levy on the joint or several property of the defendants, or any of them, the judgment being against all; that the plaintiff was at liberty to disregard the levy made upon the property of Wiswall, for the sheriff was bound by the directions of the plaintiff's attorney to levy on the property of the Gibbonses only. Referring to the case of *Walters v. Sykes*, 22 Wend. 566, the court said the sheriff might, by the direction of the plaintiff's attorney, as a special agent, be restrained and limited to any act which is within his general authority under the writ. We therefore see that the execution is issued for the benefit of the plaintiff therein, or the owner thereof; that it is the duty of the sheriff to conform to his directions in the execution of the process when within his general authority under the writ; that the plaintiff may direct the amount of the execution to be made from the joint or several property of the defendants therein, and in the judgment, or that of any of them. It follows that the judgment in this case being against four defendants, and the execution therein against the four, it was competent for this plaintiff to direct the amount thereof to be levied on the property of any of them; that as he could direct the whole to be made out of the property of any of the defendants, it also follows that he could direct less than the whole to be made in like manner. Upon the defendant's theory, Ketchum could have been compelled to pay the whole judgment. Undoubtedly the plaintiff could have collected the whole judgment from his property. Upon the same principle and for the same reason the whole of the judgment could have been collected from the

property of the defendants Clarke and Sharpe. If the whole could have been collected from them, it is difficult to see why two thirds may not be. It was therefore clearly the duty of the sheriff to conform his action to the directions of the plaintiff, and collect the two-third part of the judgment out of and from the property of the defendants Clarke and Sharpe levied on by him; and as the referee has not found that such property was inadequate to make such amount, we must assume it was sufficient for that purpose. The plaintiff was therefore damnified to the extent of two thirds of the amount of his judgment by reason of the refusal of the defendant to comply with his directions, and the referee properly gave judgment for that amount.

The judgment should be affirmed.

MULLIN, J., was for a reversal.

All the other judges being for affirmance, judgment affirmed.

EXTENT TO WHICH PLAINTIFF MAY CONTROL HIS EXECUTION, AND DUTY OF SHERIFF TO OBEY: See *McDonald v. Neilson*, 14 Am. Dec. 431, and note discussing the question; see also *Fletcher v. Bradley*, 36 Id. 324; *Chase v. Plymouth*, 50 Id. 52; *Lawson v. State*, 50 Id. 238. The sheriff is bound to follow the instructions of the plaintiff in execution within his general duty: *Ansonia Brass etc. Co. v. Babbitt*, 74 N. Y. 402. The plaintiff may direct the execution not to be returned: *Wehle v. Connor*, 69 Id. 550; or he may direct the sheriff to hold it and do nothing with it until further orders: *Smith v. Erwin*, 77 Id. 471; or where he has recovered a joint judgment against several persons, he has the right to direct the whole or any part of the judgment to be made out of any of the defendants: *Starry v. Johnson*, 32 Ind. 440. The principal case is cited to the foregoing points. As to an attorney's power to control the execution, see note to *Clark v. Randall*, 76 Am. Dec. 264. The principal case is cited in *Douglas v. Haberstro*, 88 N. Y. 621, to the point that the plaintiff's attorney has the right to direct enforcement or non-enforcement of the process.

THE PRINCIPAL CASE IS CITED IN *Attorney-General v. Continental L. Ins. Co.*, 38 Hun, 522, to the point that a party may waive a statutory or constitutional provision for his benefit.

HOOKEE v. EAGLE BANK OF ROCHESTER.

[30 NEW YORK, 83.]

CORPORATION MAY BE CHARGED FOR SERVICES RENDERED FOR ITS BENEFIT, although the employment was not formally authorized or ratified by the directors. The corporation will be bound if the services are rendered by persons who are employed by its officers or agents acting within the scope of their authority, or where the employment is unauthorized, but the services are performed with the knowledge of the directors, and received by them without objection.

CONTRACT REFERRED TO BY WITNESS IN HIS DEPOSITION NEED NOT BE PRODUCED if the interrogatories do not call for its terms or mention the contract.

DOCUMENTS, TESTIFIED IN DEPOSITION TO HAVE BEEN SEEN BY WITNESS, NEED NOT BE PRODUCED, where the evidence shows that they were left in the hands of the adverse party, giving rise to the presumption that they were at the time in his custody.

ASSIGNMENT OF CHOSE IN ACTION MAY BE MADE WITHOUT WRITING, and the assignee thereof may sue in his own name in equity or under the New York code of procedure.

ACTION to recover for services rendered, the complaint containing one cause of action on special contract, and another on *quantum meruit*. The plaintiff claimed, and gave evidence, that the defendant, through its president and two other officers, entered into a contract with certain architects, Kauffman and Bissel, by which the defendant was to pay the architects one thousand dollars for plans and specifications and superintending a building it was about to erect. The defendant afterwards sold the premises to one Chappel, who dismissed Kauffman and Bissel after one half of the work was done, and employed another architect. Kauffman and Bissel assigned their claim to the plaintiff. Evidence of the assignment was objected to, because it was not in writing, but the objection was overruled. The plaintiff gave in evidence the deposition of one Potter, and certain objections thereto are stated in the opinion. The defendant moved for a nonsuit, because: 1. No cause of action had been proved; 2. Neither of the issues had been proved; and 3. The assignment to the plaintiff was invalid because it was not in writing; but the motion was denied. The court charged the jury that the plaintiff could not recover on the special contract unless he proved an express contract between Kauffman and Bissel and the defendant, and that the defendant could only so contract by resolution of its board of directors, or by its officers acting within the scope of their authority; but that if no express contract was proved, a contract might be implied from the request of the defendant or its officers to do the work, and upon the performance of services in pursuance of the request, and the subsequent ratification thereof by the defendant, the defendant was bound to pay what the services were reasonably worth. The jury found a verdict for the plaintiff for five hundred dollars, and judgment was rendered accordingly. The judgment was affirmed at a general term of the supreme court, and the defendant appealed.

T. C. Montgomery, for the respondent.

By Court, MULLIN, J. Proof was given on the trial tending to prove an express contract by the defendant to employ Kauffman and Bissel as architects to make plans, etc., for the new building, and to pay them therefor the sum of one thousand dollars. The jury, by finding for the plaintiff five hundred dollars only, must have found there was no express promise to pay Kauffman and Bissel one thousand dollars, but they have found an agreement to employ them; that they, Kauffman and Bissel, have performed services for the defendant, and that such services are reasonably worth five hundred dollars. It is not necessary, in order to charge a corporation for services rendered, that the directors, at a formal meeting, should either have formally authorized or ratified the employment. For many purposes the officers and agents of the corporation may employ persons to perform services for it, and such employment, being within the scope of the agent or officers' duty, binds the corporation. In other cases, if an officer employs a person to perform a service for the corporation, and it is performed with the knowledge of the directors, and they receive the benefit of such service without objection, the corporation is liable upon an implied *assumpsit*: *Danforth v. Schoharie Turnpike Co.*, 12 Johns. 227; *Dunn v. Rector of St. Andrews*, 14 Id. 118; *Long Island R. R. Co. v. Marquand*, 6 N. Y. Leg. Obs. 168; *Fister v. La Rue*, 15 Barb. 323; *Ex parte Peru Iron Company*, 7 Cow. 540; *American Ins. Co. v. Oakley*, 9 Paige, 496 [88 Am. Dec. 561]; *Peterson v. Mayor of N. Y.*, 17 N. Y. 449; *Commercial Bank v. Kortright*, 22 Wend. 348 [84 Am. Dec. 817]; *Hanna v. Mills*, 20 Id. 91 [84 Am. Dec. 216]; *Perkins v. Washington Ins. Co.*, 4 Cow. 645; Angell and Ames on Corporations, secs. 7, 8. There was sufficient evidence to authorize the verdict.

Sundry objections were made to the evidence of the witness Potter, taken on commission. It appeared that he had entered into a contract with the defendant to build the foundation of a new building, and perform other work connected therewith; and in his answers to some of the interrogatories, he spoke of the contract, and it was objected that the contract should have been produced. The interrogatories did not call for the terms of such contract, nor do they even mention a contract. The witness, in stating his connection with the building, spoke of his contract, but did not give, nor propose to give, the terms of it. There was no ground whatever for the objection, and it was properly overruled.

The same witness was asked whether he had seen plans and specifications made by Kauffman and Bissel. He replied that he had. The defendant's counsel objected that the papers should be produced, and this objection was overruled. The witness Bissel testified that the plans, etc., were left with some of the officers of the bank, and the architect employed after Kauffman and Bissel were discharged used some of them. The judge might well presume the papers in the defendant's custody; and if so, the bringing of the suit was sufficient notice to produce them. These objections were properly overruled.

The defendant moved for a nonsuit on several grounds, all of which are disposed of by the legal propositions above advanced, except one, and that is, that the assignment from Kauffman and Bissel to the plaintiff, being without writing, was void.

A chose in action might at law be assigned without writing, so as to enable the assignee to enforce the debt or demand assigned in the name of the assignor, if there was a valuable consideration and a delivery of the thing assigned: *Ford v. Stuart*, 19 Johns. 342; *Briggs v. Dorr*, 19 Id. 95; *Prescott v. Hull*, 17 Id. 284. Such an assignment, in equity, enabled the assignee to sue in his own name.

A book debt is a chose in action and assignable: *Dix v. Cobb*, 4 Mass. 508; and may, like any other chose in action, be assigned by parol: *Jones v. Witter*, 13 Mass. 304; *Briggs v. Dorr*, 19 Johns. 95, and cases cited; *Fashion v. Atwood*, 2 Cas. Ch. 7, 87; *Dunn v. Snell*, 15 Mass. 485.

Under the code, an assignment valid as an equitable assignment is equally valid at law: Code, sec. 111.

The charge was right, and the judgment must therefore be affirmed, with costs.

All the judges concurring, judgment affirmed.

CORPORATION MAY BE LIABLE ON CONTRACT NOT FORMALLY AUTHORIZED OR RATIFIED BY IT: *Melledge v. Boston Iron Co.*, 51 Am. Dec. 59, and note collecting prior cases; *Mount Sterling etc. Co. v. Looney*, 71 Id. 491; *Abby v. Billups*, 72 Id. 143. It is bound by the acts of its authorized agents: *Abby v. Billups*, *supra*, and prior cases in the note thereto; and the agent's authority may be implied: *Melledge v. Boston Iron Co.*, *supra*, and note referring to other cases in this series. But whether a municipal corporation is liable on implied contract for benefits received, see *Zottman v. San Francisco*, 81 Id. 96. For the requisites of a ratification by a corporation of an unauthorized contract, see *Blen v. Bear River etc. Co.*, 81 Id. 132. As to matters within the scope of their powers, the doctrines of estoppel and of ratifica-

tion by acquiescence and acceptance of benefits are as well settled with regard to corporations as they are in the case of natural persons: *Kneeland v. Gilman*, 26 Wis. 42. If an employment and performance are within the knowledge and acquiescence of those who are authorized to act for a corporation, the corporation is bound to recompense the person performing the services: *Landers v. Frank Street Church*, 15 Hun, 343; so a person may be entitled to a reasonable compensation for his services and advice in aiding the president of a corporation as his counsel in making a contract, executed by the contractors and approved by the company: *Risley v. Indianapolis etc. Ry*, 1 Id. 212; S. C., 4 Thomp. & C. 23; and a corporation is liable in *assumpsit* for goods received and used in its business to the same extent as a natural person: *Perkins v. Hatch*, 4 Hun, 188. The principal case is cited to the foregoing points.

PAROL ASSIGNMENT OF CHOSE IN ACTION IS VALID, both at law and in equity: *Doremus v. Williams*, 4 Hun, 460; *Greene v. Republic F. Ins. Co.*, 84 N. Y. 575; *Cory v. Leonard*, 1 Thomp. & C. 188. Under the code an assignment valid as an equitable assignment is equally valid at law: *Doremus v. Williams*, *supra*; *Chapman v. Plummer*, 36 Wis. 266; and so by a statute in Michigan: *Draper v. Fletcher*, 26 Mich. 155. The principal case is cited to the above.

THE PRINCIPAL CASE IS ALSO CITED in *Walker v. Spencer*, 13 Jones & S. 74, to the point that all rights and interests *ex contractu* are assignable; in *Treas v. Slater*, 86 N. Y. 631, to the point that it is not entirely clear how much must be done to make an effectual assignment of an account; and in *Lasson v. Bachman*, 81 Id. 618, to the point that where the pleadings give notice to a party to be prepared to produce a particular instrument, if necessary to contradict the evidence of the opposite party, no further notice need be given before secondary evidence may be received.

BUTLER v. MURRAY.

[20 NEW YORK, 82.]

MASTER OF VESSEL IS FOR MOST PURPOSES AGENT OF OWNERS OF SHIP AND CARGO; but that agency does not extend to a sale of either, unless there is a necessity at the time for so doing.

TO JUSTIFY SALE OF CARGO BY MASTER AT INTERMEDIATE PORT, there must be a necessity for it, arising either from the nature or condition of the property, or from the inability to complete the voyage by the same ship, or to procure another; the master must have acted in good faith; and he must, if practicable, consult with the owner before selling.

ADVICE OF PERSONS CALLED BY MASTER TO EXAMINE CARGO IS NOT CONCLUSIVE AS TO NECESSITY OF SALE, but should be taken into consideration by the jury in determining the question, and is entitled to very considerable weight, where the master, at an intermediate port, found his cargo of hides to be in a bad and perishing condition, and summoned three dealers in and shippers of hides, to examine the hides and declare what it was proper for him to do under the circumstances, who, in good faith, advised a sale, and the hides were sold accordingly.

QUESTION AS TO NECESSITY OF SALE OF CARGO BY MASTER SHOULD BE SUBMITTED TO JURY, if a doubt exists, on the facts, as to the necessity.

ACTION to recover the value of a quantity of hides. The schooner *Pedee*, belonging to the defendants, sailed July 6, 1855, from Aspinwall for New York, *via* St. Jago de Cuba, having on board a quantity of hides and skins, consigned to the plaintiffs. Two or three days after sailing, the master, mates, and crew were taken sick with the Chagres fever, and the two mates and one of the crew died. The master and the rest of the crew were unable, from sickness, to navigate the vessel for nearly sixty days. About July 31st, she was blown ashore near Darien, and considerably damaged. On September 1st, she put into the port of Carthagena, in distress. On her arrival it was discovered that the hides and skins were being destroyed by worms and bugs, the hair being eaten off, and holes eaten in them. The master caused them to be taken on deck and beaten, thereby removing the vermin for the time being. The vessel was found not to be in a condition to continue the voyage. Under these circumstances the master, acting under the advice of the United States consul, summoned, in good faith, three respectable American merchants, who were dealers in and shippers of hides from Aspinwall to Carthagena, and from the latter place to New York, to examine the hides and advise him what it was proper for him to do. The survey declared that the hides were very much injured, and advised a sale, because it was almost certain that the hides would be destroyed before reaching New York, since it was necessary that the vessel should be repaired in Carthagena, and then go to St. Jago de Cuba. The hides were accordingly sold by the master, at public auction, for \$344.66; and this sum, after deducting general average, was tendered to the plaintiffs. The hides were purchased by Foster and Horner, at Carthagena, and after being thoroughly beaten, and washed in sea water, were shipped by another vessel to New York, where they were sold, February 2, 1856, at private sale, for about nine hundred dollars, after deducting charges. The testimony of certain witnesses, as to the condition of the hides, is given in the opinion. The jury were charged that they must find for the plaintiffs, and the only question for them to decide was the amount of damages. The plaintiffs had a verdict and judgment accordingly. The judgment was affirmed at a general term of the supreme court, and the defendants appealed.

John Sherwood, for the appellants.

J. Edgar, for the respondents.

By Court, MULLIN, J. The master of a vessel is, for most purposes, the agent of the owners of the ship and cargo; but that agency does not extend to a sale of either, unless there is a necessity at the time for so doing: *Abbott on Shipping*, 365 et seq., in notes.

The degree of the necessity which must be shown to have existed in order to justify a sale of ship or cargo has been differently stated by different judges and writers on maritime law. In 1 *Parsons on Contracts*, 66, it is said: "He [the master] may sell the property intrusted to him in a case of extreme necessity, and in the exercise of a sound discretion. Nor need this necessity be actual in order to justify the master and make the sale valid. If the ship was in peril which, as estimated from all the facts within his means of knowledge, was imminent, and made it the most prudent course to sell the ship as she was, without further endeavors to get her out of her dangerous position, this is enough, and the sale is justified and valid, although the purchasers succeed in saving her, and events prove that this might have been done by the master."

In 2 *Smith's Leading Cases*, 576, the author of the notes says: "In order to make out a case for a sale without express authority, it would appear necessary to show that the property at risk has been placed in a position of such imminent danger that it may be destroyed or materially injured before recourse can be had to those to whom it belongs, unless the intervention of other means is resorted to than those which can be commanded by the master."

Chancellor Kent, in his *Commentaries*, vol. 3, p. 173, says: "But if the voyage is broken up by ungovernable circumstances, the master, in that case, may even sell the ship or cargo, provided it be done in good faith, for the good of all concerned, and in a case of supreme necessity, which sweeps all ordinary rules before it."

Lord Ellenborough, in *Campbell v. Thompson*, 1 Stark. 490, S. C., 2 Eng. Com. L. 187, says: "The master can only sell the cargo in case of urgent necessity."

Abbott, C. J., in *Freeman v. East India Co.*, 5 Barn. & Ald. 617, S. C., 7 Eng. Com. L. 211, says there must be an apparent necessity. In the same case, *Bayley, J.*, says: "It must

be a case of absolute necessity." Park, J., in *Skeen v. McGregor*, 1 Bing. 242, S. C., 8 Eng. Com. L. 491, says: "A sale can only be made in a case of inevitable necessity."

In Massachusetts, the court says: "There must be a necessity, or, as it is sometimes expressed, a legal necessity, before the master can sell": *Bryant v. Commonwealth Ins. Co.*, 18 Pick. 543, 551.

The difficulty lies not so much in finding the rule as in applying it in a given case.

There is no doubt but that, in order to justify the sale of a cargo at an intermediate port, several things must concur: 1. There must be a necessity for it, arising either from the nature or condition of the property, or from the inability to complete the voyage by the same ship or to procure another; 2. The captain must have acted in good faith; 3. He must, if practicable, consult with the owner before selling: *Abbott on Shipping*, 447, and notes; *New England Ins. Co. v. Brig Sarah*, 13 Pet. 387; *Bryant v. Commonwealth Ins. Co.*, 13 Pick. 543.

No question as to the good faith of the captain, or of his inability, under the circumstances, to consult with the owners, is raised. But it is insisted that a necessity for the sale is not proved, for two reasons: 1. Because the property, although injured, could by a moderate outlay have been put in order so as to be carried to New York without further material injury; and 2. The master should have sent forward the property by another vessel.

Neither the master nor owners were answerable for the delay which had occurred after leaving Aspinwall. It was caused by a visitation of Providence, against which human foresight could not guard.

The damage to the hides arose from their own inherent properties and the heat of the climate in which the voyage was made. Before unloading the hides at Carthagena, the worms that caused the damage were discovered on the deck of the vessel,—when the hides were taken from the hold and put on the deck,—the hair was found eaten off, and holes eaten in them; and if permitted to remain in the vessel, it is not denied but that they would have been utterly ruined. The captain caused them to be beaten while on the deck, which it is shown is one means of removing, in whole or in part, the vermin that was causing the injury. The vessel was found not to be in a condition to continue the voyage, and another ship might have been procured to carry the hides to New York,

as the purchasers of them at the master's sale chartered a vessel which brought them to New York.

If the hides were then in a condition which justified a sale in order to prevent total loss, it would seem to follow that it would have been folly to have hired another vessel to bring to New York property that would be ruined before it arrived.

The question then comes to this: Was the master justified in selling the property at Carthagena? or in other words, Was the condition of the property such that it was necessary to sell it in order to prevent a total loss? It does not appear that the captain had any acquaintance with the means of preventing injury to hides by vermin, other than is possessed by every person in the community. He was called on to deal with the property as it then was, without any peculiar skill as to the best mode of protection or cure. It was quite obvious the property must be removed from the hold, and the master did it. Beating the hides was a mode in which the worms could be removed for the time being, and that was done. There is no evidence that the master knew that washing in sea water would be any greater protection than the means he had already employed. Under these circumstances, he summoned three respectable men, dealers in hides and the shipment thereof from Aspinwall to Carthagena and from the latter place to New York, to examine the hides and declare what it was proper for him to do under the circumstances. They advised a sale, and the hides were sold; and, as witnesses, they swear that the advice was given in good faith. This advice was not conclusive; but the question is, whether, on view of the facts then known to the parties, it was apparently necessary to sell the hides. The remarks of Parker, C. J., in *Gordon v. Massachusetts Fire and Marine Ins. Co.*, 2 Pick. 263, in regard to the weight which should be given to a survey of a vessel made after injury, in order to determine what it is the duty of the master to do with her, apply with great force to the point under consideration. He says, when a vessel has been so far injured by a peril of the sea as to make a survey necessary, and the master, with perfect good faith, calls such a survey, and the persons appointed to take it are competent in point of skill and wholly disinterested, and they, after a full and sufficient examination of the vessel, find her essentially injured, and come to a fair conclusion that, from the high price of materials and of labor, or the difficulty of procuring them, the expense of repairing will be more than the worth of the vessel

after she is repaired, and therefore they advise, for the interest of all concerned, that the vessel be sold,—in such a state of things as this, it seems to me that a moral necessity is imposed on the captain “to act according to their advice.” The jury, in passing on the question of necessity, must take into consideration the opinion of these persons thus called on to aid the master by their advice, and that opinion is entitled to very considerable weight.

“If,” say the court, in the opinion just cited, “they acted fairly, and the captain acted fairly, his acts, in conformity with their opinions, will be justified, unless it shall be made to appear by those who contest the loss that the facts on which they founded their opinion were untrue, or the inferences they drew from those facts were incorrect; and the burden of proof should be on those who would impeach their proceedings.”

But it is said that the persons who gave the opinion that the cargo ought to be sold, assumed, as part of the groundwork of their opinion, that the hides were to remain on the *Pedee* and be carried to New York in her, instead of being sent forward by another vessel, as it was the master's duty to do.

The survey, as it is called, does say that the vessel having to be repaired in Carthagená, and then go to St. Jago de Cuba before the hides could reach New York, it was almost certain that not a single hide would arrive at that place. But in the evidence of these witnesses they go much further than this survey,—or rather it is stated as their opinion that the property was in such a condition that it ought not to have been reshipped. Horner testifies that it was his opinion that the hides ought to be sold. Hanabergh says the sale was proper and necessary, owing to the condition of the hides; Foster, that a large portion of the hides were only fit for glue,—they would become worse daily until totally destroyed. Before examining the hides, he thought the best course would be to re-ship them; but on examination, he was of opinion that the master's only and best course was to sell them. Sanchez, one of the surveyors, testifies that the reshipment involved the actual loss of the hides. Barros says the hides were too much damaged to be kept any longer without danger of a total loss.

Other witnesses qualify their opinions by saying that the hides would be a total loss if reshipped on the *Pedee*, to be by her carried to New York.

I have referred to the opinions of the witnesses to show that there was a question for the jury on the facts as to the neces-

sity of the sale, and that it was wholly improper, in view of this evidence, to render a verdict for the plaintiff. If the jury should believe, from the evidence of the witnesses, that judging from the condition of the hides as they were when found on the wharf at Carthagena, that if reshipped by any vessel and sent to New York within a reasonable time, they would be so damaged as to be practically valueless as hides, the defendants would be entitled to a verdict.

Although it has happened that the hides did arrive in New York, and were sold for a much larger price than that received in Carthagena, and although it is competent to prove those facts, and for the jury to consider them in determining the question of necessity, yet the question after all must be determined upon the facts existing at the time when the sale was made.

In every aspect in which I have examined the case, a case is presented which made it necessary to submit it to the jury; and because it was not done, the judgment of the supreme court must be reversed, and a new trial ordered, costs to abide event.

All the other judges concurred, except WRIGHT, J., who did not vote.

Judgment reversed.

MASTER'S AUTHORITY AS AGENT OF OWNER: See note to *Duncan v. Reed*, 63 Am. Dec. 642. Ship-owners are liable for advances and payments made on account of the vessel, and services rendered in procuring freight, upon the request of the master: *McCready v. Thorn*, 51 N. Y. 460, citing the principal case.

MASTER'S POWER TO SELL VESSEL OR CARGO: See *Duncan v. Reed*, 63 Am. Dec. 635, and note discussing the question: *Gaither v. Myrick*, 66 Id. 316. The principal case is cited in *McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 517, on the question what constitutes an urgent necessity justifying the master in making a sale of the vessel.

THE PRINCIPAL CASE IS DISTINGUISHED in *Murray v. Great Western Ins. Co.*, 39 Hun, 583, in holding certain unverified reports of persons appointed by a consul of the United States to make a survey of a wrecked vessel inadmissible in evidence in an action brought upon a policy of marine insurance.

RIPLEY v. AETNA INSURANCE COMPANY.

[80 NEW YORK, 133.]

STATEMENT MADE BY INSURED IN SURVEY IS WARRANTY, when the policy refers to and makes the survey a part of the policy; and the fact that the statement is promissory rather than affirmative does not alter the rights and duties of the parties, for if the promise is not kept, the insurer is not bound by the policy.

INTENTION OF PARTIES MUST BE GIVEN EFFECT IN CONSTRUING CONTRACTS OF INSURANCE as in the construction of all other contracts.

ANSWER BY INSURED TO QUESTION IN SURVEY, whether there was a watchman in the building during the night, that "there is a watchman nights," must be understood to mean that there was a watchman in the building every night; and the warranty is broken, and the policy annulled, if no watch was kept from twelve o'clock Saturday night till twelve o'clock Sunday night.

EVIDENCE OF CUSTOM OF FACTORIES IN VICINITY OF ONE INSURED not to keep a watch from twelve o'clock Saturday night till twelve o'clock Sunday night should not be permitted to control the language of the contract of insurance, which must be understood to mean that there was a watchman in the factory every night.

PAROL EVIDENCE CANNOT BE RECEIVED TO CONTROL OR MODIFY WARRANTY in a policy of insurance; and therefore evidence to show that the agent of the insurer was informed that a watchman was not kept in the insured building from twelve o'clock Saturday night till twelve o'clock Sunday night is inadmissible to control a warranty that a watchman was in the building every night.

BREACH OF WARRANTY ANNULS POLICY, without regard to the materiality of the warranty, or whether the breach had anything to do in producing the loss.

CONDITION IN POLICY OF INSURANCE THAT NO ACTION SHALL BE BROUGHT FOR RECOVERY OF ANY CLAIM UPON IT, unless the action shall be commenced within one year after the loss or damage, is valid and binding.

WAIVER OF CONDITION TO BE OPERATIVE must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition.

CONDITION AS TO BRINGING ACTION ON POLICY OF INSURANCE WITHIN CERTAIN TIME IS NOT WAIVED by the insurance company, on being applied to for the payment of the loss, declining to enter into any negotiation concerning the claim while certain suits in which the company had been garnished were pending.

Action on a policy of insurance, issued by the defendant upon the factory, and the stock of goods therein, of the Glendale Woolen Company. The application for insurance had been made to the defendant's agents, Plunkett and Hurlburt. Plunkett called at the factory and examined it, and left, to be filled up and returned to him, a printed survey blank, which contained, among other questions, the following: "Is there a watchman in the mill during the night?" "Is there also a

good watch-clock?" "Is the mill left alone at any time after the watchman goes off duty in the morning till he returns to his charge at evening?" To which the following answers were made: "There is a watchman nights"; "No clock; bell is struck every hour from eight, P. M., till it rings for work in the morning"; "Only at meal times, and on the sabbath and other days when the mill does not run." The survey, containing the foregoing questions and answers, was forwarded to Plunkett and Hurlburt, and by them to the defendant, which issued the policy September 11, 1848, for one year. The policy contained a clause providing that the "survey is made a part of the policy"; and it also contained an agreement to the effect that "no suit or action of any kind against said company for the recovery of any claims upon, under, or by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur." On Sunday morning, April 8, 1849, the factory and its contents were destroyed by fire. No watchman was accustomed to be in the factory from twelve o'clock Saturday night till twelve o'clock Sunday night. On June 23, 1849, the defendant's secretary wrote a letter to one Taft, the treasurer of the Glendale Woolen Company, in reply to a demand for payment of the loss, stating that the defendant would not enter into any negotiations concerning the claim while certain suits against the Glendale Woolen Company and others interested in the stock of the company, in which the defendant was garnished, were pending. The defendant afterwards, by a letter written August 7th, refused to pay anything towards the loss, on the ground that the alleged warranty as to the watchman had been broken. An action on the policy was commenced within the year, but it was afterwards withdrawn. The present action was begun in December, 1852. The questions in the case are fully stated in the opinion. The plaintiff had a verdict, upon which judgment was rendered accordingly. The judgment was affirmed at a general term of the supreme court, and the defendant appealed.

George F. Comstock, for the appellant.

David Dudley Field, for the respondent.

By Court, MULLIN, J. Much evidence was given on the trial for the purpose of reforming the application for insurance, so that the answers to the questions in regard to the keeping

a watchman in the factory should be made to express the understanding of both parties on that subject. But inasmuch as the learned justice who tried the cause held that the application needed no reformation, that, by its terms, the insured were not bound to keep a watchman in the factory from twelve o'clock on Saturday night until twelve o'clock on Sunday night, the case is relieved of the questions raised on the trial, as to the competency of the evidence given for the purpose of procuring a reformation of the contract, and whether a case was made by the evidence that would have entitled the plaintiff to that relief.

Before proceeding to ascertain what the construction of the clause of the application under consideration is, it is important to know whether it is a warranty or a representation merely.

The paper which contained the questions and answers in regard to keeping a watchman in the factory is called, in the policy, a survey, and this survey is expressly referred to in the policy and made a part of it.

Angell, in his work on fire and marine insurance, defines a warranty as being a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. The stipulation is considered to be on the face of the policy, although it may be written on the margin, transversely, or on a subjoined paper referred to in the policy.

What is said on the subject of a watch in the factory is contained in the survey, filled out by the insured and delivered to the agent of the insurer, and the policy refers to and makes this survey a part of itself. It is therefore clearly within the definition of a warranty as laid down by the learned author of the treatise cited, as well as that given by our own courts to that term: *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72 [22 Am. Dec. 567]; *Brown v. Cattaraugus Ins. Co.*, 18 N. Y. 385; *Chase v. Hamilton Ins. Co.*, 20 Id. 52.

If at the time the survey was made the factory was not in operation, and the statements contained in it as to the watch kept therein is to be considered promissory rather than an affirmative warranty, yet the rights and duties of the parties are not altered. If the promise has not been kept,—the condition precedent performed,—the insurer is not bound by the policy: Angell on Insurance, sec. 145; 2 Duer on Insurance, 749; 1 Arnould on Insurance, 502.

The clause of the survey being a warranty, it then becomes important to ascertain its construction, in order to determine whether it has been broken. In construing contracts of insurance, effect must be given to the intention of the parties, as in the construction of all other contracts.

The rule is very clearly stated by Lord Ellenborough, in *Robertson v. French*, 4 East, 135. The same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz., that it is to be construed according to its sense and meaning as collected, in the first place, from the terms used in it, which terms themselves are to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same word, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.

It was of the highest importance to the insurer, in order that it might be able intelligibly to decide whether it would assume the risk, or if it assumed it, to fix the premium to be charged, to know whether a watch was kept in the factory proposed to be insured, at what time such watch was kept, and the means, if any, of determining whether he discharged faithfully his duty. The question "Is there a watchman in the mill during the night?" was a very significant one, and the answer, "There is a watchman nights," was a full response to the inquiry. A watch-clock being constructed so as to require the watchman to be at it each hour, or his absence would be discovered in the morning, the question whether there was a watch-clock was also a very significant one. Their answer was, there was no clock, but the bell was struck every hour, from eight, P. M., until it rang for work in the morning, furnished perhaps the next best means of securing watchfulness on the part of the watchman.

The next question to which an answer was required is: "Is the mill left alone at any time after the watchman goes off duty in the morning till he returns to his charge at evening?" To which it was answered: "Only at meal times, and on the sabbath, and other days when the mill does not run."

Fires in the factory might be produced in either of four modes: from fire used in the building, from the friction of the

machinery, spontaneous combustion, and by an incendiary. There was no danger from fire used in the building when the building was not occupied, except for a few hours after each day's work closed, and until it was put out. Nor was there any danger from friction, unless the machinery was in motion; nor from incendiaries, unless when there was no person in the mill; but there was constant danger from spontaneous combustion. A watch in the factory during the night afforded a great security against injury from fire from any cause in the night; and as the danger existed every night in the week, it was important to the insurers to know whether a watch was on hand every night.

It being important to the insurer to know whether a watch was kept every night, and the question put being general,—whether a watch was kept during the night,—the answer that there is a watch nights must have been understood to apply to every night. No exception being made in the question, and there being an obvious necessity for a watch every night, both parties must have understood the question and answer to apply to every night. If the insured intended to exclude any night, they should have done it clearly and distinctly. It was no more difficult to say that no watch was kept from twelve o'clock Saturday night to twelve o'clock Sunday night than it was to exclude the sabbath in the answer to the next question. And the fact that an exception was made in the next answer is some evidence that none was intended to be made in the first.

It seems to me quite clear that the answer, "There is a watchman nights," is to be understood to mean there was a watchman in the factory every night. But evidence was given on the trial of a custom of factories in that section of the country not to keep a watch from twelve Saturday night till twelve o'clock Sunday night, and that the answers are to be construed in reference to such custom. "A custom, in order to become a part of a contract, must be so far established and so far known to the parties that it must be supposed that their contract was made in reference to it. For this purpose the custom must be established and not casual, uniform and not varying, general and not personal, and known to the parties": 2 Parsons on Contracts, 53; *Dawson v. Kittle*, 4 Hill, 107.

Within the above rule it seems there was no such evidence as would authorize the court to find a custom amongst the

factories in the vicinity of the one insured which should be permitted to control the language of the contract in question. The answers to the questions in the survey must be interpreted according to the popular meaning of the language used.

It is insisted by the defendant's counsel that the agent of the insurer was informed that a watchman was not kept in the factory from twelve o'clock Saturday night till twelve o'clock Sunday night, and therefore the case is to be considered as if the answers in question were in accordance with the verbal information. But it is well settled that parol evidence cannot be received to control, explain, or modify a warranty in an insurance policy: *Angell on Insurance*, 143; *Jennings v. Chenango Mutual Ins. Co.*, 2 Denio, 75; *Kennedy v. St. Lawrence Mutual Ins. Co.*, 10 Barb. 285.

In 2 Denio the court held that the rule which prevails upon sales of property—that a warranty does not extend to defects which are known to the purchaser—does not apply to warranties contained in policies of insurance; and that parol evidence that the insured truly informed the agent of the insurer who prepared the application as to the situation of the buildings, which differed from the statement in the application, is not admissible. The same propositions were restated in *Kennedy v. St. Lawrence Mut. Ins. Co.*, 10 Barb. 285.

The question has been before this court, and I am unable to say what conclusion it has arrived at in reference to it.

In *Bidwell v. Northwestern Ins. Co.*, 19 N. Y. 179, it was held that when a marine policy stated the insurance to be on account of A, loss, if any, payable to B, and the vessel was warranted by the assured free from all liens, and B held a mortgage on the vessel, subject to two prior mortgages, the insurance was that of A, the owner, on the vessel, and not of B upon his interest as mortgagee of A's equity of redemption; and that the prior mortgage was a breach of the warranty and fatal to the recovery. The answer admitted that the defendant was informed when the application for insurance was made of the interest of the mortgagee, and that the loss was made payable to him to secure his interest as mortgagee. The cause was again tried; there was a verdict and judgment for the plaintiff, which was affirmed at the general term and again brought before this court, and it is reported in 24 N. Y. 302. I do not find that the facts are materially changed,

although the learned judge says they were; yet from his summary of them it does not appear that the case was especially changed. It was nevertheless held that the existence of the liens constituted no breach of the warranty. And the *dicta* in the opinion go the length of utterly sweeping away all the distinctions which have been supposed to exist between warranties in policies of insurance and contracts of sale. If this court is at liberty to consider itself not bound by the decisions on this question, but that it may now establish a rule that it shall deem to be more wise and just, I am not prepared to say that the doctrine of the learned judge in the case cited is not the best. But I trust we shall adhere to principles which have been so long settled, and in conformity to which so many contracts have been made, and the abandonment of which will produce great injustice.

The doctrine of the case of *Bidwell v. Northwestern Ins. Co.*, 24 N. Y. 302, last referred to, may stand without interfering with the cases in 2 Denio, 75 (*Jennings v. Chenango M. I. Co.*), and 10 Barb. 285 (*Kennedy v. St. Lawrence M. I. Co.*), above cited, and I do not think the principles of the case should be extended beyond the facts of that case.

If I am right in supposing that parol evidence cannot be received to vary the warranty in this case, then the evidence given on that point, and received by the judge, should have been rejected.

The next inquiry in order is, Has the warranty been broken? On this subject there is no dispute. It is conceded by the defendant that if the answer to the question as to the watchman cannot be construed as it was construed by the learned judge at the circuit, then it was broken, because it is true that no watch was kept from twelve o'clock on Saturday night until twelve o'clock on Sunday night.

The effect of the breach of the warranty is to annul the policy, without regard to the materiality of the warranty, or whether the breach had anything to do in producing the loss.

The effect is very well stated by Marshall, in his work on insurance, 249. He says: "A warranty being in the nature of a condition precedent, and therefore to be performed by the insured before he can demand performance of the contract on the part of the insurer, it is quite immaterial for what purpose or with what view it is made, or whether the insured had any view at all in making it. But being once inserted in the

policy, it becomes a binding condition on the insured, and unless he can show it has been literally performed, he can derive no benefit from the policy. The very meaning of a warranty is to preclude all question whether it has been substantially complied with or not. If it be affirmative, it must be literally true; if promissory, it must be strictly performed. . . . With respect to the compliance with warranties, there is no latitude, no equity. The only question is, Has the thing warranted taken place or not? If it has not, the insurer is not answerable for any loss, even though it did not happen in consequence of the breach of warranty."

I am unable to perceive any good reason why parties to a contract may not agree that an action for a breach of it shall be brought within a period shorter than that fixed for bringing an action, or that the right of action shall be deemed abandoned. So far from interfering with, it more effectually secures, the end sought to be attained by the statute of limitations. This question was directly up in *Ames v. New York Union Ins. Co.*, 14 N. Y. 253, and it was there held that such a condition in a policy of insurance was valid. Had it not been for the waiver of the condition in that case the action would have been barred.

But the plaintiffs meet this defense by alleging, and as they claim proving, that it was waived by the company, and the learned judge charged the jury that if the defendant waived this condition the action could be maintained. He further instructed them that if the defendant suggested a postponement until certain attachments were removed, and at the same time were silent in regard to the limitation, that would be a waiver. The circumstances to which the judge alluded in this part of his charge must be the letter of the defendant's secretary of the 23d of June, 1849. That letter was written in reply to a demand by the treasurer of the Glendale Company for pay of the loss, and it informs Mr. Taft, to whom it was written, that the defendant would not enter on any negotiation touching the claim until the garnishee suits mentioned in the letter were removed.

It seems to me that a waiver, to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition.

There is not in this case any agreement to waive the condi-

tion requiring the suit to be brought within a year; nor is the defendant estopped from insisting on the condition.

If my tenant agrees to pay me rent on a day named, or his lease will be forfeited, and if before the day I agree, for a valuable consideration, to waive the condition, I am bound by the agreement. If, without consideration, I agree that he may pay after the day, and he by reason thereof omits to pay at the day, I am estopped from enforcing a forfeiture. But if, without consideration, I assent to a waiver of payment at the day, but before the day withdraw my assent, and insist on performance in such season as to enable him to perform, I am not estopped. Nor was the defendant in this case estopped, even if the above letter, or the negotiation between the officers of the factory and the insurer, could be considered as a waiver of the condition.

But I can find nothing in the evidence which would justify the inference that either party understood at the time there was a waiver. The letter of the 7th of August must have removed any impression of the sort from the minds of the officers of the factory company. By that letter they were distinctly informed that the defendant would not recognize any claim against it under the policy, or upon any matter connected therewith. And what is entirely conclusive upon the subject, the factory company, within the year, commenced their action in Connecticut, thus demonstrating, in the clearest possible manner, that they did not then suppose the defendant had waived the condition.

In no aspect of the case am I able to discover any ground on which this action can be maintained. The judgment of the general term must be reversed, and a new trial ordered, costs to abide the event.

All the judges concurring on both grounds, judgment reversed.

STATEMENT IN APPLICATION OR SURVEY IS WARRANTY when the application or survey is made part of the policy: *Burritt v. Saratoga County M. F. Ins. Co.*, 40 Am. Dec. 345, and note; *Frost v. Saratoga M. Ins. Co.*, 49 Id. 234; *Glendale Woolen Co. v. Protection Ins. Co.*, 54 Id. 309; *Sheldon v. Hartford F. Ins. Co.*, 58 Id. 420; *Hartford Protection Ins. Co. v. Harmer*, 59 Id. 684; compare *Daniels v. Hudson River F. Ins. Co.*, 59 Id. 192. An application or survey is a part of the policy when it is referred to by the policy and made a part of it: *Owens v. Holland Purchase Ins. Co.*, 56 N. Y. 570; *Shoemaker v. Glens Falls Ins. Co.*, 60 Barb. 101, 102; *Steward v. Phoenix F. Ins. Co.*, 5 Hun, 284; and the application, survey, and policy are to be construed together as parts of one entire contract: *Clinton v. Hope Ins. Co.*, 51 Barb. 650; and the

statements in the application or survey become warranties: *First Nat. Bank v. Insurance Co. of North America*, 50 N. Y. 47; *Flynn v. Equitable L. Assur. Co.*, 7 Hun, 389. The principal case is cited to the foregoing points. *Glendale Woolen Co. v. Protection Ins. Co.*, *supra*, *Sheldon v. Hartford F. Ins. Co.*, *supra*, are very similar to the principal case.

EVIDENCE OF CUSTOM OR USAGE TO EXPLAIN OR CONTROL WRITTEN OR OTHER EXPRESS CONTRACT: See *Glendale Woolen Co. v. Protection Ins. Co.*, 54 Am. Dec. 309, and note; *Beirne v. Dord*, 55 Id. 329, and note; *Cox v. O'Riley*, 58 Id. 633; *Daniels v. Hudson River R. R.*, 59 Id. 192; *Hartford Protection Ins. Co. v. Harmer*, 59 Id. 684; *Barlow v. Lambert*, 65 Id. 374, and note; *Cox v. Peterson*, 68 Id. 145; *Ford v. Tirrell*, 69 Id. 297; *Steele v. McTyer's Adm'r*, 70 Id. 516; *Ripley v. Crooker*, 74 Id. 491; *Whitemarsh v. Conway F. Ins. Co.*, 77 Id. 414; *Farnsworth v. Hemmer*, 79 Id. 756; *Dickinson v. Gay*, 83 Id. 656. The case of *Whitemarsh v. Conway F. Ins. Co.*, *supra*, is very similar to the principal case. A custom, in order to become part of a contract, must be so far established and so far known to the parties that it must be supposed that the contract was made with reference to it: *Sipperly v. Stewart*, 50 Barb. 68; and proof of knowledge of the existence of a custom, or of such facts from which it may fairly be inferred, is ordinarily essential to the establishment of a valid custom: *Boardman v. Gaillard*, 1 Hun, 220; S. C., 3 Thomp. & C. 608, both citing the principal case.

PAROL EVIDENCE IS INADMISSIBLE TO CONTROL OR MODIFY CONTRACT OF INSURANCE: *Norris v. Insurance Co. of North America*, 2 Am. Dec. 360; *Cheriot v. Barker*, 3 Id. 437; *Ever v. Washington Ins. Co.*, 28 Id. 258; *Moliere v. Pennsylvania F. Ins. Co.*, 28 Id. 675; *Burrows v. Turner*, 35 Id. 622; *Bell v. Western M. & F. Ins. Co.*, 39 Id. 542; *Finney v. Bedford Commercial Ins. Co.*, 41 Id. 515; *Holmes v. Charlestown M. F. Ins. Co.*, 43 Id. 428; *Sheldon v. Hartford F. Ins. Co.*, 58 Id. 420. The principal case is cited in *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 439, to the point that parol evidence is inadmissible to show that both parties knew that a statement in an application for a policy was not true.

BREACH OF WARRANTY AVOIDS POLICY: *Burritt v. Saratoga Co. M. F. Ins. Co.*, 40 Am. Dec. 345, and note; *Glendale Woolen Co. v. Protection Ins. Co.*, 54 Id. 309; *Daniels v. Hudson River F. Ins. Co.*, 59 Id. 192, and note; and the warranty may be promissory, requiring the promise to be kept: *Grant v. Lexington etc. Ins. Co.*, 61 Id. 74; and see *Stout v. City F. Ins. Co.*, 79 Id. 539. See the principal case cited on this latter point, in *First Nat. Bank v. Insurance Co. of North America*, 50 N. Y. 47; *Blumer v. Phoenix Ins. Co.*, 45 Wis. 629, 651.

CONDITION IN POLICY THAT NO ACTION SHALL BE BROUGHT FOR RECOVERY OF ANY CLAIM UPON IT, unless commenced within a certain time after the loss or damage, is valid and binding, and actions must be commenced within the time limited: *Fullam v. New York Union Ins. Co.*, 66 Am. Dec. 462; *Stout v. City F. Ins. Co.*, 79 Id. 539; *Patrick v. Farmers' Ins. Co.*, 80 Id. 197; compare *Grant v. Lexington etc. Ins. Co.*, 61 Id. 74. The principal case is an authority for this proposition, in *Roach v. New York etc. Ins. Co.*, 30 N. Y. 548; *Wilkinson v. First Nat. F. Ins. Co.*, 72 Id. 502; S. C., 9 Hun, 523; *Arthur v. Homestead F. Ins. Co.*, 78 N. Y. 466; *Mix v. Andes Ins. Co.*, 9 Hun, 399; *Horne Ins. Co. v. Stanchfield*, 1 Dill. 431; S. C., 2 Abb. 6; *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 392; and the doctrine was applied in *Young v. Western Union T. Co.*, 65 N. Y. 169, S. C., 2 Jones & S. 396, to a stipulation on the blank of a telegraph company, requiring claims for damages to be presented in writing within a certain time.

WAIVER OF CONDITIONS IN POLICIES OF INSURANCE, WHAT AMOUNTS TO: See *Allegre v. Maryland Ins. Co.*, 14 Am. Dec. 289; *Trask v. State F. & M. Ins. Co.*, 72 Id. 622; *Smith v. Haverill Mut. F. Ins. Co.*, 79 Id. 733; *Sheldon v. Atlantic F. & M. Ins. Co.*, 84 Id. 213; *Keeler v. Niagara F. Ins. Co.*, 84 Id. 714. The waiver of a condition, to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition: *Underwood v. Farmers' Joint Stock Ins. Co.*, 57 N. Y. 506; S. C., 48 How. Pr. 372; *Marvin v. Universal L. Ins. Co.*, 16 Hun, 496; *Lasher v. Northwestern Nat. Ins. Co.*, 18 Id. 104; S. C., 57 How. Pr. 229; *McDermott v. Lycoming F. Ins. Co.*, 12 Jones & S. 230. The principal case is an authority for this proposition; but in *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 442, it was distinguished, in holding a condition to be waived; and in *Dohn v. Farmers' Joint Stock Ins. Co.*, 5 Lans. 278, where it was held that no new consideration was required to support the waiver of such a condition as that proofs of loss should be furnished within a certain time; it was said that the remarks of Mullin, J., in the principal case, to the contrary, were not necessary to the decision. An insurance company cannot allow one of its officers to induce the insured to omit to present proofs of loss, or commence suit in time, and then take advantage of such omission by questioning its officer's power: *Solomon v. Metropolitan Ins. Co.*, 10 Jones & S. 25, citing the principal case. The knowledge of the agent of an insurance company of the falsity of a warranty will not relieve the insured or his representatives from the consequence of a breach: *Bartean v. Phoenix M. L. Ins. Co.*, 67 N. Y. 595, citing the principal case.

JEWELL v. WRIGHT.

[80 NEW YORK, 269.]

PROMISSORY NOTE IS CONTROLLED, AS TO DEFENSE OF USURY, BY LAWS OF STATE where it is made, dated, and payable, and not by the laws of the state where it is negotiated.

ACTION on a promissory note for four hundred dollars, dated and payable at Lockport, New York, one year after date, without interest. The note was made by the defendant Wright to the order of the defendant Dunlap, and indorsed by the latter for the accommodation of the defendant Taylor. Taylor took the note to Connecticut, induced the plaintiff to guarantee it for his benefit, and then procured it to be discounted by one Day, at Hartford, at the rate of twelve per cent. The note was afterwards taken up by the plaintiff, and this action instituted. The court directed a verdict for the plaintiff, subject to the opinion of the court at general term, upon a case to be made. The general term gave judgment for the plaintiff on the verdict, and the defendant appealed.

George W. Cothran, for the appellant.

James S. Gibbs, for the respondent.

By Court, INGRAHAM, J. It was not denied on the trial of this cause that the note on which the suit was brought was negotiated at a rate of interest illegal, both in Connecticut and New York.

The main question in the case is, whether the laws of New York or Connecticut are to control as to the defense of usury. The note was negotiated in Hartford, but was payable at Lockport in New York.

Nor can it be denied that a contract is to be governed by the laws of the place where it is made, if it is not to be performed according to the terms of the contract elsewhere: *Story's Conflict of Laws*, sec. 282; *Holbrook v. American F. I. Co.*, 6 Paige, 230; 2 Kent's Com. 457; *Davis v. Garr*, 6 N. Y. 124 [55 Am. Dec. 387].

But if such note or contract is by its terms to be performed in another state, then the laws of that state must govern: 2 Kent's Com. 460. This rule was laid down by this court in *Jacks v. Nichols*, 5 N. Y. 178. The court, in delivering the opinion, says: "Concede that the contract was made in Connecticut, if it was to be performed in New York, it must, *prima facie*, be regarded as having been made with reference to the laws of New York." The fact that the note was dated in New York is alone presumptive evidence that the maker not only resided at the place of its date, but contemplated payment there. For the purpose of charging the indorsers, the makers must have been sought at their residence or place of business in this state. The same is stated in *Curtis v. Leavitt*, 15 Id. 9, 227, where it is said: "It is a general rule that the law of the place where contracts purely personal are made must govern as to their construction and validity, unless they are to be performed in another state or country, in which case their construction and validity depends upon the law of the place of performance." In *Bowen v. Newell*, 13 Id. 290 [64 Am. Dec. 550], it was held that the law of the place where the note or draft is payable governs as to the days of grace allowed upon it. In *Everett v. Vendryes*, 19 Id. 436, it was held the law of the place where the bill was payable controlled as to the liability of the drawer to the indorsee. And in *Cutler v. Wright*, 22 Id. 472, it was held that a note made in New York, but dated Florida, and payable there, was governed by the laws of that place; and it is said the authorities do not leave this question in doubt. The same was also held in *Pomeroy v. Ainsworth*, 22 Barb. 127.

These cases from our own courts render it unnecessary to examine any other class of decisions upon this point.

The judgment should be reversed, and a new trial ordered.

DAVIES, J., read an opinion in favor of affirmance.

SELDEN, J., was absent.

All the other judges being for reversal, judgment reversed.

The principal case is also reported in 18 Abb. Pr. 80, and in 27 How. Pr. 481.

CONTRACT IS GOVERNED BY LAW OF PLACE WHERE MADE, if it is not to be executed elsewhere: *May v. Breed*, 54 Am. Dec. 700, and note; *Speed v. May*, 55 Id. 540; *Houghtaling v. Ball*, 59 Id. 331; *Phinney v. Baldwin*, 61 Id. 62; *Young v. Harris*, 61 Id. 170; *Smith v. Godfrey*, 61 Id. 617; *Peck v. Hibbard*, 62 Id. 605; *Emerson v. Patridge*, 62 Id. 617; *McAllister v. Smith*, 65 Id. 651; *Spears v. Shropshire*, 66 Id. 206; *Emanuel v. White*, 69 Id. 385; *Kanaga v. Taylor*, 70 Id. 62; *Lockwood v. Mitchell*, 70 Id. 78; *Born v. Shaw*, 72 Id. 633; *Stanford v. Pruett*, 73 Id. 734; *Walters v. Whitlock*, 76 Id. 607; *Hunt v. Standart*, 77 Id. 79; *Ayer v. Tilden*, 77 Id. 355; *Winslow v. Brown*, 80 Id. 638. The principal case is cited to this point in *Merchants' Bank v. Griswold*, 72 N. Y. 480; *Cope v. Alden*, 53 Barb. 356; S. C., 37 How. Pr. 187; and see the cases cited *post*. A contract made in one state, and to be performed there, is governed by the law of that state; and a defense or discharge, good by the law of the place where the contract is made or to be performed, is of equal validity everywhere: *Graham v. First Nat. Bank*, 84 N. Y. 401, citing the principal case.

PROMISSORY NOTE IS CONTROLLED, AS TO DEFENSE OF USURY, BY LAWS OF STATE where it is made, dated, and payable, and not by the laws of the state where it is negotiated: *Dickinson v. Edwards*, 77 N. Y. 576 et seq.; S. C., 58 How. Pr. 26 et seq.; 7 Abb. N. C. 71 et seq.; *Cope v. Alden*, 53 Barb. 356; S. C., 37 How. Pr. 187; *Hackettstown Nat. Bank v. Rea*, 64 Barb. 178; S. C., 6 Lana. 455; *Hildreth v. Shepard*, 65 Barb. 270; *Clayes v. Hooker*, 4 Hun, 234; S. C., 6 Thomp. & C. 450; *Dickinson v. Edwards*, 13 Hun, 406, 407; *Scott v. Perlee*, 39 Ohio St. 68. The principal case is approved on this point in the foregoing; and it is also approved, but distinguished, in the following: *Wayne County Savings Bank v. Low*, 81 N. Y. 570, 571; *Sheldon v. Haxton*, 16 Hun, 198; but it is denied in *Wayne County Savings Bank v. Low*, 6 Abb. N. C. 84 et seq.; *Brown v. Bradley*, 9 Abb. Pr., N. S., 397; S. C., 1 Sheld. 227. The dissenting opinion of Davies, J., in the principal case appears in a note to the decision last cited. While it is thus seen that the principal case has been questioned, its authority must be considered as established by the decision of the court of appeals in *Dickinson v. Edwards*, first cited above. See further, on this question, *Davis v. Garr*, 55 Am. Dec. 387, and note.

THE PRINCIPAL CASE IS ALSO CITED in *Hull v. Augustine*, 23 Wis. 396, to the point that a defendant seeking to avail himself of the defense of usury to a foreign contract is bound to set up in his answer the foreign law which renders the contract void, and sustain the allegation by proof at the trial.

HARRIS v. MOODY.

[80 NEW YORK, 206.]

JETTISONED GOODS STOWED ON DECK OF STEAMER NAVIGATING LONG ISLAND SOUND ARE ENTITLED TO BENEFIT OF GENERAL AVERAGE, especially if it is the usage to stow goods on deck.

ALL PROPERTY ON BOARD VESSEL AT TIME OF JETTISON IS LIABLE TO CONTRIBUTION, except that attached to the persons of the passengers.

BANK BILLS ON BOARD STEAMER, FOR TRANSPORTATION, AT TIME OF JETTISON, ARE PROPERTY, liable to contribute to the general average loss, although they are carried in a crate for the owners by an express company, which by agreement pays the owners of the steamer a fixed sum annually for carrying a certain number of crates with their contents.

ACTION to recover a parcel of bank bills of the value of \$1,171, on which the defendants claimed a lien.. From the agreed statement of facts it appeared that the steamer Connecticut, while on a voyage on Long Island Sound, from New York to Allyn's Point, Connecticut, encountered a heavy gale, and to save the vessel, a large amount of the cargo was jettisoned. The jettisoned cargo was carried on the main deck of the steamer, according to the established usage, the space below that deck being occupied by the engine, boilers, coal, etc., and by the passengers. The bank bills were being carried in a crate on the steamer, for the plaintiffs, by Adams & Co., express agents and forwarders, who collected the charges for transportation from the plaintiffs and others who employed them. By an agreement between Adams & Co. and the owners of the steamer, the former paid the latter a fixed sum annually for carrying a certain number of portable crates with their contents. The owners of the steamer claimed that the bills were liable to contribute with other property saved to the payment of the general average loss occasioned by the jettison. The jury were directed that the plaintiffs could not recover. The defendants had a verdict and judgment accordingly, and the plaintiffs appealed.

John E. Burrill, for the appellants.

Daniel Lord, for the respondents.

By Court, DAVIES, J. Two questions are presented for consideration and determination upon this appeal: 1. Whether jettisoned goods stowed on the deck of a steamer are entitled to the benefit of general average; 2. Whether the particular species of property belonging to the plaintiffs in this action, and retained by the defendants, is liable to contribute for the

general average loss. These questions will be considered in the order stated.

By the Rhodian law, as cited in the Pandects, if goods were thrown overboard, in a case of extreme peril, to lighten and save the ship, the loss, being incurred for the common benefit, is to be made good by the contribution of all: 3 Kent's Com. 232. The necessity of the jettison in the present instance, and that the goods sacrificed were the price of the safety of the vessel and of those saved, are conceded in the statement of facts. Chancellor Kent, in 3 Kent's Com., p. 239, lays down the rule, as deduced from the authorities cited by him, that goods shipped on deck contribute, if saved, to the average loss, but if lost by jettison, they are not entitled to the benefit of general average, and the owner of the goods must bear the loss without contribution; and the reason assigned by him for this rule is that the goods, by reason of their situation upon deck, increase the difficulty of the navigation, and are peculiarly exposed to peril. And a further reason for the rule is stated, that the carrier, in that case, is not responsible to the owner, unless the goods were stowed on deck without the consent of the owner, or a general custom binding him, and then he would be chargeable with the loss; citing, as authorities, Consulat. de la Mer, c. 183; Ord. de la Mar, 3, 8, 13; Emerigon, c. 12, sec. 42; *Smith v. Wright*, 1 Caines, 43 [2 Am. Dec. 162]; *Lenox v. United Ins. Co.*, 3 Johns. Cas. 178; Boulay-Paty, tome iv. 566; Code de Commerce, art. 421; *Dodge v. Bartol*, 5 Me. 286 [17 Am. Dec. 233]; *Hampton v. Brig Thaddeus*, 4 Mart. (La.) 582; Abbott on Shipping, 5th Am. ed., 578; Story on Bailments, 839; *Johnston v. Crane*, 1 Kerr, 356; *Wolcott v. Eagle Ins. Co.*, 4 Pick. 429.

Smith v. Wright, 1 Caines, 43 [2 Am. Dec. 162], was an action to recover the value of goods shipped on deck and ejected. It was proved in that case that goods on deck, if lost, are paid for by the underwriters on those goods, without contribution from the assurers of the vessel or other parts of the cargo; and one merchant testified that he once owned goods stowed on deck which were lost by jettison, and being uninsured, he claimed nothing from the owner of the vessel or other part of the cargo; that he conceived it to be the general understanding that for goods ejected from the deck no contribution is to be made by the owner of the vessel or of other goods. The court held that the owner was not entitled to general average, as the shippers of goods under hatches, and the insurer on the ship and cargo

were not liable to contribution on account of their presumed ignorance of any part of the cargo being placed in so perilous a situation. The point decided in the case was that the carrier was not liable for the loss of goods shipped on deck when thrown into the sea for the preservation of the ship and cargo. In *Lenox v. United Ins. Co.*, 3 Johns. Cas. 178, the court held that for stores shipped and insured, and thrown overboard to lighten the vessel, the underwriters were liable only for a partial loss, and that a loss of the lading on deck could not be charged as general average. *Cram v. Aiken*, 13 Me. 229 [29 Am. Dec. 503], was decided on the authority of these cases, and also that of *Dodge v. Bartol*, 5 Me. 286 [17 Am. Dec. 233]. And the reason assigned for the rule is, that goods laden on deck are peculiarly exposed to peril, and increase the difficulty and dangers of navigation.

It is to be observed here that this rule has only been applied to sailing vessels, and for the sole reason that the lading of the goods on the deck increased the difficulty of the navigation, and it was consequently regarded as unjust that that portion of the cargo which imperiled the vessel and the other parts of the cargo, if thrown overboard, should be compensated for. Its presence in the particular locality was regarded as in some degree the cause of the peril, or at least its destruction was called for to insure the safety of the residue by reason of its dangerous locality. This general rule is also enunciated by Abbott on Shipping, at page 78, and he says the reason of the rule, as given by Valin, is that goods so carried embarrass the navigation of the ship. But Valin adds that he thinks this doctrine should be controlled by the usages of the trade; and accordingly, that contribution may be claimed for goods thrown overboard from the deck of small coasting vessels or river craft, which usually carry a part of their cargo on deck: 2 Valin, 203; see 1 Emerigon, 640. An examination of the cases will show that the rigor of this rule has been greatly departed from, and one adopted more in consonance with the habits and usages of trade as now practiced, and the modes adopted for the transportation of freight upon water. It might perhaps be sufficient to show the inapplicability of the rule as laid down by Chancellor Kent to say that it was made and applied exclusively to sailing vessels, and the reason given for its adoption can have no force as applied to ships propelled by steam. That reason was that the goods carried on deck embarrassed the navigation because

thus placed there; that to remove them made the vessel more easily navigable, and thus tended to insure her safety. No such reason has any application to a vessel propelled by steam. The space under deck of this particular vessel was otherwise appropriated than for cargo; and the parties in this action have agreed that it was the established usage and custom upon this particular boat to carry its cargo on the main deck. The reason of the law ceasing, the law itself ceases, and the case might safely, I think, be left here. But an examination of the authorities will show that there are exceptions to the rule, and that even in the present case, if the vessel upon which these goods had been laden were a sailing vessel, the goods jettisoned would have been entitled to a general contribution. We have already noticed the exception made by Valin of small coasting vessels or river craft, which usually carry a part of their cargoes on deck. This demonstrates that the rule, as he understood it, applied only to sea voyages. This vessel was in the sound, and usually carried her cargo on deck. These facts show how inapplicable to her is a rule made to govern voyages at sea, and especially in reference to vessels navigated with sails. Arnould on Insurance, vol. 2, p. 890, in discussing this doctrine of jettison, observes that the most important exception is that of goods carried on deck, which, as they tend to embarrass the navigation, are not contributed for if jettisoned, unless they are so carried according to the common usage and course of trade on the voyage for which they are shipped. On proof, however, of such usage, they are contributed for if jettisoned, like other goods, and no notice to the underwriters of the existence of such custom is necessary in order to make them liable, they being bound to know the usage of the particular trade. Thus carboys of vitriol, timber on the voyage between London and Quebec, and pigs between London and Waterford, have been contributed for after jettison, though carried on deck, a usage of trade being proved in each case so to carry them.

The authority cited to sustain the proposition that goods carried on deck, because they tend to embarrass the navigation, are not contributed for if jettisoned, has been already referred to. The authority of Valin for the exception made has already been adverted to. Other cases recognize the same exception: *Brown v. Cornwell*, 1 Root, 60, was decided in 1773. The question put to the court in that case was, whether stock (horses) shipped upon the deck, in case it is thrown over-

board to save the vessel and the rest of the cargo, will entitle the owners to an average upon the goods, etc., shipped in the hold of the vessel, that was saved. The court determined that the law was so, that it did; that although stock upon deck is more exposed to damage, and in a storm exposes the vessel to greater risk than goods in the hold, yet as it is the universal custom to ship goods in the hold, with stock upon deck, when the stock upon deck is thrown overboard for the express purpose of saving from destruction the cargo in the hold, it is but reasonable that the cargo saved should bear a proportion of the loss which was the price of its ransom. In *Gould v. Oliver*, 4 Bing. N. C. 134, it was held that the proprietor of goods laden on the deck of a ship, according to the custom of a particular trade, is entitled to contribution from the ship owner for a loss by jettison. Tindal, C. J., in delivering the opinion of the court, observed that Valin lays it down that the rule in article 13 does not apply in respect of boats and other small vessels going from port to port, "when the usage is to load merchandise on the deck." The latter words of which text-writers give as the reason for throwing such case out of the exception into the general rule for contribution, at least so far as the ship is concerned. He says that as to the authorities in the English courts, there is no one which states directly that goods laden on deck shall in no case be entitled to contribution. The question, however, whenever it has arisen in our courts, has been between the owner of the goods thrown overboard and the underwriter. And the rule generally established seems to have been, that for goods so laden the underwriters are not responsible: *Ross v. Thwaite*, Park on Insurance, 21; *Backhouse v. Ripley*, Id. [mis-cited]. To the same point may be cited *Lenox v. United Ins. Co.*, 3 Johns. Cas. 178; and that the owners are not liable, *Smith v. Wright*, 1 Caines, 43 [2 Am. Dec. 162], and *Cram v. Aiken*, 13 Me. 229 [29 Am. Dec. 503]. But Chief Justice Tindal proceeds to observe that in *Da Costa v. Edmunds*, 4 Camp. 142, it was left to the jury to say whether there was a usage to carry goods on deck, of the description of those thrown overboard; and the jury having found such usage, the underwriters were held liable. The case now under consideration does not, indeed, arise between the same parties, but it appears to fall within the same principle. *Da Costa v. Edmunds* was an action on a policy of insurance, to recover from the underwriters the value of forty carboys of vitriol, stowed on deck, and thrown overboard in a storm, on a voyage from London to

Lisbon. It appeared that carboys of vitriol were very frequently carried on the decks of the ships, but that it was likewise usual to stow them below, bedded in sand, in which situation they are considered safe. Lord Ellenborough left it to the jury to say whether it was usual to carry vitriol on the deck, and whether these carboys were properly stowed. If there was a usage to carry vitriol on the deck, the underwriters were bound to take notice of it without any communication of such usage, and all they could require was, that these carboys should be properly stowed, in the usual manner. On the other hand, they were not liable if the goods were carried on deck without such a usage; or if they were not stowed there in a skillful and proper manner. The jury found for the plaintiffs, and a rule was refused. The case of *Milward v. Hibbert*, 3 Q. B. 120, S. C., 2 Gale & D. 142, is quite to the point. It appeared that a quantity of pigs, in the course of a voyage from Waterford to London, were thrown overboard from the deck, where they were stowed. It was insisted that for the deck-stowed pigs no contribution could be claimed. The court thought otherwise, and Lord Denman, in delivering its opinion, said: "The practice appears to have been, not to lay it down as a rule of law, that for goods stowed on the deck the owner of them shall be excluded from the benefit of the general average, but to receive evidence of commercial men respecting the usage of the trade and the general understanding of those engaged in it (and in insuring), which may obviously vary, and require from time to time fresh evidence and different explanations."

I arrive at the conclusion, therefore, that the rule laid down by the earlier writers as applicable to sailing vessels upon a sea voyage has no relation to the voyage of the steamer Connecticut upon its voyage up the sound from the port of New York to that at Allyn's Point; and that if it had, the usage established in this case to stow the goods on deck takes it out of that rule and brings it within the exception early recognized and so frequently followed. It results, therefore, that the vessel and cargo of the steamer became liable to contribute to the loss of the goods jettisoned, notwithstanding the same were stowed upon the deck of the steamer. It may also be observed that the rule is universal that goods stowed on deck, if saved, contribute to the general loss, and it is not perceived on principle why, as they contribute to the general loss, they should not also be entitled to be contributed for when destroyed for the general safety.

The next question is, whether the particular species of property belonging to the plaintiffs in this action, and retained by the defendants, is liable to contribute for the general average loss. By the Rhodian law everything on board the vessel saved contributed to make up the loss, and in the essay on that law concerning jettison, translated from the digests and code of Justinian, it is said: "Several merchants had loaded various quantities of goods on board the same ship, in which were several passengers, both freemen and slaves. In consequence of a violent storm a jettison became indispensable. It was asked whether all must contribute to the jettison, and whether those must contribute who had goods on board the vessel, such as pearls, jewels, etc., and whether there must be a contribution for the heads of freemen, and by what action it could be enforced. It was determined that all must contribute who had an advantage from the jettison, because it was a tribute due by those things which had been preserved, and therefore that the owner of the vessel was bound to contribute for his share; the amount of the jettison must be apportioned according to the value of the goods. It has also been agitated whether an estimation is to be made of the clothes and jewels of every person, and it was unanimously agreed that they should contribute." Arnould thus announces upon what property contribution is to be levied: "All which is ultimately saved out of the whole adventure (i. e., ship, freight, and cargo) contribute to make good the general average loss, provided it had been actually at risk at the time such loss was incurred, but not otherwise, because if not at risk at the time of the loss it was not saved thereby": 2 Arnould on Insurance, 921. Gold, silver, jewels, precious stones, and all other small articles of value, unless carried about the person, contribute. He, says Mr. Phillips, thinks bank notes, being not so much property as evidences of property, ought not to contribute. Nesbitt, he observes, considers that they should, and his seems to be the better opinion, for they are convertible into money, and are saved by the sacrifice from becoming valueless: 2 Arnould on Insurance, 923. Phillips says: "As much of the cargo on board at the time of making a jettison, or other sacrifice for the general safety, as finally arrives at the port of delivery, or comes to the use of the owner, contributes in general average."

Mr. Benecke says: "Passengers ought to contribute for their trunks and luggage, because, if cast overboard, their value is allowed for." Phillips says: "This reason does not appear very

satisfactory,—a plainer one seems to be, that the baggage is benefited by the jettison in proportion to its value in comparison with its whole value at risk, precisely as any other property is so.” Emerigon is of the opinion that of right and upon general principles everything belonging to passengers, even to their wearing apparel, is liable to contribution. Valin considers the wearing apparel, jewels, rings, ornaments, and in general whatever a passenger habitually wears, uses, or carries about his person during the voyage, including his change of linen, to be exempted from contribution by the concurrent authority of the ordinances and writers. And Phillips says this seems to be the general practice. He adds: “If any part of the baggage is of sufficient value to be worth bringing into contribution, no reason has been given why it should not contribute a part of the contributing interest.” The reason for exempting wearing apparel and the like seems to be that the persons of those on board are not brought into contribution, and the exception extends to things which are merely necessary to the person. This discussion shows how universally all that is on board ship at the time of the jettison, and saved from the impending peril, is called upon to contribute, and the only exception is the persons on board and what is necessarily attached to them. And the reason given for the exemption of the person on board is, that it is impossible to estimate the value of freemen. Slaves on board at time of the jettison have been valued and made subjects of contribution. Park, J., in *Brown v. Stapleton*, 4 Bing. 119, says: “The rule is that all merchandise put on board for the purpose of traffic is liable to be brought into contribution, and in merchandise is included all property of great value, unless attached to the persons of the passengers, but property so attached does not contribute.” It may therefore be considered as settled by text-writers and by judicial authority that all property on board at the time of the jettison, and saved, unless attached to the persons of the passengers, is to be brought into contribution.

It remains to be considered whether the parcel of bank bills belonging to the plaintiffs are to be regarded as property. That they are so treated by the plaintiffs is apparent from the pendency of this action. The complaint alleges that the defendants have become possessed of and wrongfully detain the following property of the plaintiffs: that is to say, one package of bank bills of the value of \$1,171. In the face of this allegation it will hardly be permitted to the plaintiffs to argue

that this package of bank bills is not property, and has no actual value.

In *Turner v. Fendall*, 1 Cranch, 116, the supreme court of the United States held that money may be taken in execution if in the possession of the defendant; that it could be levied on and seized as the goods and chattels of the defendant. In *Handy v. Dobbin*, 12 Johns. 220, an execution was issued against the goods and chattels of Handy, by virtue of which the officer seized two five-dollar bank bills of the goods of Handy. Spencer, J., in delivering the opinion of the court, observed that there can be no doubt that the constable, under the attachment, could take any goods and chattels which could be levied on by execution. The authority in both cases is the same. Bank bills are treated, *civiliter*, as money; a tender in them is good, unless it be specially objected to at the time. The question, then, is narrowed to this: Can money be levied on by execution? This court, he says, in *Williams v. Rogers*, 5 Id. 167, intimated strongly their concurrence in the decision of the supreme court of the United States, in *Turner v. Fendall*, 1 Cranch, 133. In that case all the cases on the point were reviewed, and it was held that money could be levied on. We now fully concur in the doctrine then advanced. We perceive no objection in principle why money should not be taken in execution. It is the goods and chattels of the party; and it appears to us to comport with good policy as well as justice to subject everything of a tangible nature, excepting such things as the humanity of the law preserves to the debtor, and mere choses in action, to the satisfaction of the debtor's debts: See also *Ontario Bank v. Lightbody*, 13 Wend. 102 [27 Am. Dec. 179]. *Sherman v. Wells*, 28 Barb. 403, was an action to recover certain bonds of the state of Michigan, of the nominal amount of four thousand six hundred dollars, intrusted to the defendant as a common carrier, and which were lost by the sinking of a vessel on Lake Erie, upon which they were for transportation. The defendants were held liable to pay the amount of the principal and interest of the bonds. The measure of damages was held to be the face of the bonds, unless the one party prove it to be more, or the other prove it to be less: *Sedgwick on Damages*, 512, 513; *Ingalls v. Lord*, 1 Cow. 240; *Fursdon v. Clogg*, 10 Mees. & W. 575; *Romig v. Romig*, 2 Rawle, 221; 2 Falm. 425; *Evans v. Kyme*, 1 Barn. & Adol. 528; *Reusse v. Meyers*, 3 Camp. 476; *Angell on Carriers*, sec. 285; *Glyn v. Baker*, 13 East, 509; 2

Parsons on Contracts, 471. It would seem, therefore, to be well settled that bank bills are to be regarded as property, the goods and chattels of the owner thereof; and that in case of loss the owner is entitled to recover the nominal or par value thereof, in the absence of any proof of depreciation, with the interest thereon. Such being their nature and properties, they were clearly subjected as property to the burden of contribution in the case under consideration.

But it is claimed on the part of the plaintiffs that, under the arrangement between Adams & Co. and the owners of the steamboat, the bank notes in question paid no freight, and therefore formed no part of the cargo of the vessel. We have seen from the authorities that it is not an essential element in the liability to contribution that the property on board should form a part of the cargo of the vessel. The inquiry is in testing its liability to contribute, Was the particular property or thing saved on board at the time of the jettison and in peril? If so, its duty or liability to make contribution is fixed, except in the particulars heretofore alluded to. It is true that Myers says, "What pays no freight pays no average"; but this doctrine is very generally repudiated, and no authority is cited to sustain it. Even the same author qualifies this, in that he means to exclude from contribution only the wearing apparel and ornaments belonging to the person, by saying: "If a passenger should conceal in his trunk or about his body any such considerable sum of money or jewels as would not be suffered without paying freight, he must contribute to the jettison." Here the things concealed formed neither a part of the cargo or paid freight, yet this author declares their liability to contribute. Mr. Stevens says: "It would be very unjust that the master or any other person who had goods on board should not contribute because he pays no freight."

But it is apparent from the facts presented in this case that in truth compensation was paid to the owners of the steamboat for the transportation of this particular species of property. It is of no moment that the same was made in a fixed sum for the carrying by the year the crates with their contents. The payment was in fact made for the transportation of the crates, the parcels therein being placed there for safety and convenience. And it is also a matter of no importance that such compensation or freight was paid in the first instance by Adams & Co. Adams & Co. collected their own charges for the

transportation from the plaintiffs and others who employed them, and we cannot fail to see that a portion of these charges must have been a share or proportion of the sum paid by Adams & Co. for the transportation on the steamboat of this particular parcel from the port of New York to Allyn's Point. We conclude, therefore, that this particular parcel of bank bills formed a part of the cargo of this steamer, and freight was paid therefor. It was not necessary to make it a part of the cargo that it should have been specifically received and designated as such, or that to determine the question whether or not freight was paid on it the sum should have been paid specifically on this identical parcel. We therefore arrive at the conclusion, as well upon principle as authority, that the bank bills of the plaintiffs on board of the steamer for transportation at the time of the jettison are to be deemed and taken as property, and are bound to contribute to the general average loss. If these views are correct, the judgment appealed from should be affirmed.

HOGEBOM and INGRAHAM, JJ., filed a concurring opinion.

All other judges being for affirmance, judgment affirmed.

JETTISONED GOODS SHIPPED ON DECK ARE NOT ENTITLED TO BENEFIT OF GENERAL AVERAGE, according to the following cases: *Smith v. Wright*, 2 Am. Dec. 162; *Dodge v. Bartol*, 17 Id. 233; *Cram v. Aiken*, 29 Id. 503.

PROPERTY SUBJECT TO CONTRIBUTION IN GENERAL AVERAGE: See *Brown v. Bank of United States*, 33 Am. Dec. 64.

WHITING v. BARNEY.

[30 NEW YORK, 230.]

PROTECTION FROM DISCLOSURE OF COMMUNICATIONS FROM CLIENTS TO ATTORNEYS SHOULD ONLY BE HELD TO EXTEND to such communications as have relation to some suit or other judicial proceeding, either existing or contemplated. *Per Selden, J.*

COMMUNICATION FROM CLIENT TO ATTORNEY IS NOT CONFIDENTIAL when made in the presence of the other party.

ACTION to set aside as usurious a bond and mortgage, which had been given by the plaintiff to David Barney, the defendant's testator. The court found the bond and mortgage valid, and dismissed the complaint, with costs. The only question in the case arose on the sustaining of an objection, on behalf of the defendant, to the testimony of one Hurlbert, an attor-

ney who attended to Barney's legal business, as to what was said during a conversation which Whiting, Barney, and Hurlbert had relative to the loan which was afterwards made.

S. Giles, for the appellant.

N. S. Stephens, for the respondent.

By Court, SELDEN, J. This case presents but the single question whether the conversation between the plaintiff and the defendant's testator, in the presence of Mr. Hurlbert, comes within the rule which protects the professional communications of clients to their attorneys or counsel. Upon no subject are the decisions more directly conflicting than as to the extent of this privilege. To reconcile them is impossible. It is not difficult, however, to ascertain the source of the conflict, nor, as it seems to me, to determine, with reasonable precision, the true limits of the rule. The cases on the subject may be divided into two classes, and a mere cursory examination will show that the divergence between them grows entirely out of a difference as to the real foundation of the rule.

Its origin seems to have been this: In ancient times parties litigant were in the habit of coming into court and prosecuting or defending their suits in person. Subsequently, however, as lawsuits multiplied, and the modes of judicial proceeding became more complex and formal, it became necessary to have these suits conducted by persons skilled in the laws and in the practice of the courts. This necessity gave rise, at an early day, to the class of attorneys. To facilitate the business of the courts, it was important that these men should be employed. But as parties were not then obliged to testify in their own cases, and could not be compelled to disclose facts known only to themselves, they would hesitate to employ professional men and make the necessary disclosures to them, if the facts thus communicated were thus within the reach of their opponent. To encourage the employment of attorneys, therefore, it became indispensable to extend to them the immunity enjoyed by the party.

The most instructive case on this subject with which I have met is that of *Annesley v. Earl of Anglesea*, before the barons of the Irish exchequer, 17 How. St. Tr. 1139. The case was most extensively and ably argued, and very elaborately considered by the court; and the conclusion arrived at, as to the true origin of the rule in question, may be best stated in the language of Mr. Baron Mountenay, who says, at page 1240:

“Mr. Recorder hath very properly mentioned the foundation upon which it hath been held, and is certainly undoubted law, that attorneys ought to keep inviolably the secrets of their clients, viz.: that an increase of legal business, and the inability of parties to transact that business themselves, made it necessary for them to employ (and, as the law properly expresses it, *ponere in loco suo*) other persons who might transact that business for them. That this necessity introduced with it the necessity of what the law hath very justly established, an inviolable secrecy, to be observed by attorneys, in order to render it safe for clients to communicate to their attorneys all proper instructions for the carrying on of those causes which they found themselves under the necessity of intrusting to their care.”

To the same effect is the language of Mr. Justice Paddock in the case of *Dixon v. Parmelee*, 2 Vt. 185, where, in considering this question, he says: “And this distinction seems to give a clew to that which is said to be the origin of the law, which is that, in early days, suitors brought in person their complaints before the king, and afterwards his courts; that as business increased,—the administration of justice approximating to a science, and the necessity of forms sensibly felt,—it became absolutely necessary that there should be a set of men to stand in the place of suitors, called attorneys, and manage their causes; to encourage which, and bring the same into practice, it also became necessary for courts to adopt a rule by way of pledge to suitors, that their secret and confidential communications to their attorneys should not be drawn from them, either with or without the consent of such attorney.”

If this was the true foundation of the rule, it would follow that the protection is confined to communications made with a view to the conduct of a suit, or some judicial proceeding, and it goes most forcibly to confirm and strengthen the direct authority to which I have referred, that in the earlier cases; and while the origin of the rule was most likely to be kept in view, the doctrine would seem to have had this application. The earliest cases to be found on the subject are said to be those of *Berd v. Lovelace*, Cary, 88, *Austen v. Vesey*, Id. 89, and *Kelway v. Kelway*, Id. 127, in each of which the witness was excused from testifying, on the ground that he was the solicitor in the cause. In another case in the same report, viz., *Dennis v. Codrington*, Id. 143, the excuse allowed was that the witness had been of counsel touching the matter in variance.

In *Waldron v. Ward*, Style, 449, the ground of privilege was the same. Sergeant Maynard there proposed to examine a witness as to some matter "whereof he had been made privy as of counsel in the cause." But the chief justice would not permit the examination, saying that the witness was not bound to "disclose the secrets of his client's cause."

So in *Sparke v. Middleton*, 1 Keb. 505, Mr. Aylet, who had been, as the report states, "counsel for the defendant," being called as a witness, was excused from testifying, the court of king's bench holding "that he should only reveal such things as he either knew before he was of counsel, or that came to his knowledge since, by other persons." Although it is not in terms stated, yet the plain inference from the report is, that Mr. Aylet had been counsel in the cause. The language used, "counsel for the defendant," and "before he was of counsel," would scarcely be otherwise appropriate. Thus understood, the case holds that communications from his client to Mr. Aylet before the latter was actually employed as counsel in the cause were not protected.

A precisely similar decision was made nine years afterwards, by the same court, in the case of *Cuts v. Pickering*, 1 Vent. 197. One Baker, who had been solicitor for Pickering, was called to testify concerning an erasure in a will, supposed to have been made by Pickering. Objection was made that having been retained as solicitor, he could not be examined. But the court held that, it appearing that Pickering had made the discovery to him "before such time as he had retained him," he might be sworn.

It is to be observed in regard to these two cases, that in neither is it said that the communication was not confidential, or not made to the witness in consequence of his professional character, but the decision is placed upon the sole ground that it was made before the witness was retained in the cause.

That the opinion of Lord Hardwicke was in accordance with these cases is shown by the case of *Vaillant v. Dodemead*, 2 Atk. 524, where the witness demurred to certain interrogatories, on the ground that he knew nothing of the matters inquired about, except what had come to his knowledge as clerk in court. The demurrer was overruled, and the first reason given by Lord Hardwicke was, that it appeared "that the matters inquired after by the plaintiff's interrogatories were antecedent transactions to the commencement of the suit, the knowledge whereof could not come to Mr. Bristow as

clerk in court, or solicitor." No notice is taken in this case of any distinction between clerks in courts and solicitors.

But to come down to a later period: In the case of *Wadsworth v. Hamshaw*, before Chief Justice Abbott, 2 Brod. & B. 5, in note, one Hughes, an attorney, being called as a witness by the plaintiff, stated that the defendants "had called upon him to advise them professionally respecting the dissolution of their partnership." The counsel for the defendants objected; but the chief justice, without hearing the counsel on the other side, held "that the communication was not privileged, and that the protection was only extended to those communications with an attorney which related to a cause existing at the time of the communication, or then about to be commenced." He also cited a case tried at the Midland circuit, in which the evidence of the attorney in the cause, called to prove some communication of his client, being rejected, the court, upon application, granted a new trial; expressly holding "that no professional communication was protected, except such as related to a cause." This case is important, as giving, not only the opinion of Chief Justice Abbott, but of the whole court of king's bench, in a case involving no other question.

This question came again before the same judge, in the case of *Williams v. Mundie*, 1 Ryan & M. 34. The action was *assumpsit* for goods sold; and the defendants' attorney being called by the plaintiff to prove that the defendants were partners when the goods were sold, stated that "prior to the commencement of the action and to the period when the goods were supposed to have been sold, he had been consulted by some of the defendants in relation to a partnership then about to be entered into by them." The evidence was objected to, but the chief justice said: "I think this evidence admissible. The rule I have invariably laid down in cases of this kind is, that what is communicated for the purpose of bringing an action or suit, or relating to a cause or suit existing at the time of the communication, is confidential and privileged; but what an attorney learns otherwise than for the purpose of a cause or suit, I think he is bound to communicate."

Precisely the same doctrine was laid down by Best, C. J., in the case of *Broad v. Pitt*, 3 Car. & P. 518; S. C., 1 Moody & M. 233; and in a note to the case in the latter volume, the true basis of the rule is very justly stated, as follows: "It would seem that the rule is not (as it is often put) founded

on a consideration of the importance of the communications made to attorneys, nor on any purpose of protecting the general business which attorneys are employed to carry on. The object of the rule appears to be the proper conduct of judicial investigations, to which the full and free disclosure of the client to his professional advisers is essential."

That Lord Kenyon also was of this opinion is shown by his remark in the case of *Duffin v. Smith*, Peake, 108, that "when anything is communicated to an attorney by his client for the purpose of his defense," he ought not to divulge it.

In a case before the lord chief baron, at the York summer assizes, viz., *Hargreave v. Hutchinson* [not reported], Lord Lyndhurst said that it had been held by the judges (meaning, I suppose, the twelve judges), after consideration, that the rule was that a communication to an attorney is privileged if an action be pending or contemplated.

Looking, then, at the authorities thus far noticed, at the doctrine thus enunciated, traced as it is to a reasonable and certain origin in the early periods of the common law, we should say that there could be very little doubt as to the true limits of the rule. But unfortunately there is another class of cases still more numerous which indicate a different doctrine, viz., that the privilege has no special relation to suits in court or judicial proceedings of any kind, but extends to every case where a member of the legal profession is consulted or employed professionally. We must of necessity decide which of these two classes of cases we will follow. They are directly antagonistic, and cannot both be right.

It is a marked fact, and one of great weight upon this question, that very few of the cases which give the more extended scope to this rule refer to its origin, or to any principle of policy upon which it is supposed to rest. They seem to assume that it is because the communication is confidential that it is protected, and hence great difficulty is experienced in finding any limit to the privilege.

It is said that in one case the court, led, as it would seem, by the idea that the betrayal of confidence had something to do with the rule, would not permit a trustee for the plaintiffs and defendants, who had been employed by them in the purchase of offices, to be examined, on the ground that he should not be allowed to betray a trust: See 2 Starkie on Evidence, 322.

In the case of *Wilson v. Rastall*, 4 Term Rep. 753, a leading case on this subject, it was seriously insisted that a confiden-

tial communication to a friend, relying upon his secrecy, was protected. Lord Kenyon, in delivering his opinion, said: "But in order to show that the privilege extends beyond the case of an attorney and client, a hard case has been pressed upon our feelings, of confidence reposed in a friend. But if a friend could not reveal what was imparted to him in confidence, what is to become of many cases, even affecting life?"

This remarkable uncertainty as to the rule has followed this question into the courts of this country. In *Holmes v. Comegys*, 1 Dall. 439, it was contended that communications to a confidential agent or factor, and in *Corps v. Robinson*, 2 Wash. C. C. 389, those to a confidential clerk, were protected.

These cases could never have arisen but for the fact that the courts, whenever they have extended the privilege to communications other than those which related to some existing or prospective judicial proceeding, without taking the trouble to recur to the origin of this rule, have assumed that the idea of a betrayal of confidence, or a breach of that obligation which all men recognize, to preserve inviolate a secret confided, lie at its foundation. It is upon this assumption mainly, if not entirely, that the courts have ever extended the privilege beyond what was necessary to accomplish its original objects, as here set forth, viz., to protect those having business before the courts in the employment of skilled men to transact it. The language of the judges in many of the cases prove that in making their decisions this idea was prominent in their minds.

The authoritative weight of this class of cases therefore depends in a great degree upon the correctness of this assumption. It can hardly require argument to prove that the social obligation, faithfully to guard against revealing that which is communicated in confidence, cannot by possibility have any logical connection with the rule in question. That obligation relates solely to a voluntary disclosure, and can have nothing whatever to do with the policy of the law in its efforts to ascertain truth and administer justice. It is dishonorable in one to whom a secret has been confidentially confided, voluntarily to reveal it; therefore the law, when engaged in ferreting out this very secret, should not compel its disclosure. Is this sound reasoning? No one will so pretend, and yet, palpable as is the distinction, its disregard, through the inadvertence of the courts, has had a great deal to do with the wide departure in the class of cases under consideration from the rule as originally laid down. I do not mean to say that

the courts have deliberately placed their decisions upon this obviously untenable ground, but that their language often shows that the idea of violation of trust was prominent in their minds and influenced their conclusion.

It is strongly corroborative of the view here maintained, that whenever any judge has directed his attention specially to the origin of the rule, he has in general admitted it to be as here stated. Thus in one of the cases relied upon to support the extended rule, viz., *Greenough v. Haskell*, 1 Mylne & K. 98, Lord Chancellor Brougham, in the course of a very elaborate opinion, says: "The foundation of this rule is not difficult to discern. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. . . . But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings."

But notwithstanding this distinct recognition by the chancellor of the true basis of the rule, which, if admitted, necessarily admits the privilege to communications having some connection with judicial proceedings, he nevertheless, in that very case, allows the protection to cover communications not made in reference to any such proceeding, either past, present, or future; the statement of the witness being merely that they "were received by him in his capacity of confidential solicitor for Dannall, for whom he had been professionally concerned for a number of years." How such a conclusion could be deduced from a rule founded upon such a reason, I am unable to see; and the learned chancellor would himself, I think, find it difficult satisfactorily to explain. The question was precisely the same as that in the case of *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1139; the opinion of both courts as to the true basis of the rule was the same, and yet the conclusions arrived at were directly opposite. I think very few, upon a critical examination of the two cases, would hesitate to concur with the Irish barons. It may not be improper to say that Lord Brougham, in recurring to the origin of the rule, was giving history, a matter in respect to which he was rarely mistaken. His deductions from the rule involved a different mental process.

I will here refer to two other cases, as they seem to me specially worthy of notice, viz.: *Mills v. Griswold*, 1 Root, 383, and *Calkins v. Lee*, 2 Id. 363. The question in both these cases was whether a witness is obliged to disclose, upon his oath, what the defendant had told him in confidence, and upon a promise to keep it secret.

In the first case, the court said: "The distinction is, where the communications are necessary in the course of business, as of a client to his attorney, he may not disclose them. But where the communications are voluntary, as in the present case, his oath obliges him to tell the whole truth." In the other case, it is said: "If it is a voluntary communication, and the adverse party is interested in the testimony, the witness must testify."

In these two cases the court, without expending any learning upon the origin or history of the rule, and without being confused by any considerations as to the violation of confidence, and of the solemn promise of the witness not to disclose, with that plain and unerring good sense which has so often distinguished the courts of that state, went at once to the very pith of the rule of exemption. They seem to have seen that it was only because the necessity of employing attorneys to transact the business of courts in a measure compelled the reposing of confidence in them that communications to them were protected.

There are many other considerations, as well as cases, which, if adverted to, would throw light upon this subject. But it seems to me that enough has been adduced to make it clear that the privilege in question is not founded upon any idea of the sacredness of confidential communications, whether made to an attorney or to any other person; nor upon any peculiar policy of the law which distinguishes the general business of an attorney from that of any other class in the community; but it was the result of that rule of the common law which excused parties from testifying in their own cases, and of the necessity for the convenience of the public, as well as the benefit of suitors, of having the business of the courts conducted by professional men.

Whether, therefore, the recent legislation in this state compelling parties to testify as witnesses in their own suits should be deemed to have removed the whole foundation of the rule and terminated all necessity for its continuance or not, which may admit of some doubt, it follows from the views here ex-

pressed, if correct, that the protection should only be held to extend to such communications as have relation to some suit or other judicial proceeding, either existing or contemplated.

The judgment of the supreme court at general and special term should be reversed, and there should be a new trial, with costs to abide the result.

DENIO, C. J., and WRIGHT, JOHNSON, and MULLIN, JJ., were also for reversal, on the ground that both parties being present, there was nothing confidential in the communication.

INGRAHAM, J., filed an opinion for affirmance.

HOGEBOM and DAVIES, JJ., were also for affirmance.

Judgment reversed.

COMMUNICATIONS FROM CLIENT TO ATTORNEY, WHEN PRIVILEGED: See *Thompson v. Kilborne*, 67 Am. Dec. 742, and note; *Allen v. Harrison*, 73 Id. 302, and note; *Alderman v. People*, 69 Id. 321; *Hunter v. Watson*, 73 Id. 543; *Fulton v. Maccrackin*, 81 Id. 620; *Gallagher v. Williamson*, 83 Id. 114. The doctrine announced by Selden, J., in the principal case, that the protection from disclosure of communications from clients to attorneys should only be held to extend to such communications as have relation to some suit or other judicial proceeding, either existing or contemplated, is approved in *In re O'Donohoe*, 3 Nat. Bank. Reg. 66; and the principal case is cited in *Oliver v. Pate*, 43 Ind. 140, as holding this rule; but in *Graham v. People*, 63 Barb. 483, and *Brand v. Brand*, 39 How. Pr. 260, it was said that the proposition was not assented to by other members of the court. In *Britton v. Lorenz*, 45 N. Y. 57, the principal case was cited to the point that all communications made by a client to his counsel for the purposes of professional advice or assistance are privileged, whether such advice relates to a suit pending, one contemplated, or to any other matter proper for such advice or aid; but this was said in *Bacon v. Frisbie*, 15 Hun, 28, to be extending the rule further than was stated in the principal case. Communications made in the presence of all parties are not privileged: *Britton v. Lorenz*, *supra*; *Root v. Wright*, 21 Hun, 348; *Sherman v. Scott*, 27 Id. 334; *Rosenburg v. Rosenberg*, 40 Id. 100; *Brand v. Brand*, 39 How. Pr. 282; and see *Root v. White*, 84 N. Y. 76, 77, all citing the principal case.

BEDFORD v. TERHUNE.

[30 NEW YORK, 452.]

ASSIGNMENT, AND NOT UNDERLETTING, WILL BE PRESUMED, if any presumption is to be indulged in, in the absence of proof to the contrary, where an underletting without the written consent of the lessor is made a ground of forfeiture of the term, and parties other than the lessees are in possession without such consent.

UNDERLETTING MUST BE OF PART ONLY OF UNEXPIRED TERM. When the transfer is of the whole of a term, the person taking is an assignee, and not an under-tenant, although there is in form an underletting.

ASSIGNMENT, AND NOT UNDERLETTING, WILL BE PRESUMED, in the absence of any evidence of the agreement under which parties entered into the possession of demised premises subsequent to the lessees, if it is shown that they occupied the whole of the unexpired term.

ASSIGNMENT WILL BE PRESUMED where parties entered by the consent of the lessees, had the lease in their hands, and paid the rent thereon to the lessor for the benefit of the lessees, and occupied for the whole residue of the term, and there is no evidence of a holding in any other character than as assignees.

ASSIGNMENT OF LEASE WILL BE INFERRED TO BE VALID AND OPERATIVE, where the law infers an assignment from certain facts proved; and it is incumbent on parties sought to be charged as assignees for the payment of rent to prove, either that there was no assignment, or that the assignment was void in law.

ASSIGNEES ARE LIABLE ON LEASE FOR RENT, and not in an action for use and occupation.

AMENDMENT MAY BE MADE SO AS TO CONFORM COMPLAINT FOR USE AND OCCUPATION TO PROOF that the defendants were liable on a lease for rent as assignees, the defendants not being surprised.

SURRENDER OF LEASE MUST BE PROVED BY PLAINTIFF, so that he was at liberty to relet the premises, where, in an action for use and occupation, a lease from the plaintiff to other parties, which had two years to run from the entry of the defendants, is proved; and if a surrender in law is proved, the defendants are liable for the rent.

SURRENDER OF LEASE REQUIRES MUTUAL AGREEMENT BETWEEN LESSOR AND ORIGINAL LESSEE that the lease shall terminate; but it is not necessary that the agreement should be express: it may be inferred from the conduct of the parties.

OCCUPANCY BY SOME PERSON OTHER THAN LESSEE IS CIRCUMSTANCE SHOWING SURRENDER; but as the new occupant may enter as the tenant of the lessee, or as his assignee, or even as a trespasser, and thus his occupancy be consistent with the continuance of the first lease, it is absolutely essential that it should be clearly proved that the original lessee assented to the termination of his term.

TENANTS ARE LIABLE, AS ASSIGNEES, FOR RENT ACCRUING AFTER THEIR ENTRY, where they insist that they entered under the lessees, show the lease in their hands, and prove payment of rent by them on the lease for the benefit of the lessees.

ACTION to recover the rent of a store and basement in New York City, for the quarter commencing February 1, 1858. The complaint alleged that the use of the premises was reasonably worth the sum of \$450. The defendants denied that they ever occupied the premises as tenants of the plaintiff, or that they were indebted to him in any sum whatever; and alleged that the plaintiff had leased the premises to E. & A. Ingraham & Co., for a term of two years and nine months, commencing August 1, 1855; that the defendants had occupied the premises as tenants of Ingraham & Co.; that the plaintiff had never recognized the defendants as his tenants; and that the plaintiff had never accepted a surrender of the lease

to Ingraham & Co. It appeared on the trial that the plaintiff had executed a lease to Ingraham & Co., as set forth in the defendants' answer, at a yearly rental of eighteen hundred dollars, payable quarterly. The lease gave Ingraham & Co. a right to a renewal for two years after the expiration of the term, provided they gave the plaintiff a written notice of their intention on or before the 1st of February preceding the end of the term, and contained a condition forfeiting the term if Ingraham & Co. should let or underlet without the written consent of the plaintiff. Ingraham & Co. failed, and the defendants entered into possession of the premises, the lease having still two years to run. After the failure, the plaintiff and his agent went to the store, which was then in the possession of the defendants, and the defendants told the plaintiff that he need not be afraid about his rent, as they intended to occupy the premises for the same business carried on by Ingraham & Co. The defendants continued to occupy and to pay rent at the end of each quarter at the rate stipulated in the lease, the plaintiff giving receipts, each of which stated on its face that the money was paid for and on account of Ingraham & Co.; but on May 1, 1858, when called on for the rent due for the quarter ending at that time, the defendants refused to pay, saying that they had paid enough for Ingraham & Co. The defendants had in their possession the counterpart of the lease held by Ingraham & Co. In March, 1858, the plaintiff's agent and the defendants had a conversation, in which the defendants claimed that they ought to have the premises for an additional year, as they were among the plaintiff's best tenants, and had always paid punctually. The defendants moved to dismiss the complaint, for the reasons, that there was no contract between the plaintiff and the defendants; that the plaintiff had shown nothing from which the legal relation of landlord and tenant could be inferred; and that any presumption which might arise from the occupation of the premises was rebutted by the proof of hiring. The court denied the motion. The jury were charged, in substance, that the defendants were not liable unless the parties had entered into an agreement or understanding as to the letting of the premises. The plaintiff had a verdict, upon which judgment was entered. The defendants appealed.

Albert Mathews, for the appellant.

Philip Reynolds, for the respondent.

By Court, MULLIN, J. The defendants must have occupied the premises in question either as sublessees of Ingraham & Co., as their assignees of term, or as the tenants of the plaintiff; and if they are liable for the rent to the plaintiff in either of these characters, the judgment appealed from should be affirmed.

1. Were the defendants under-tenants of Ingraham & Co.? No agreement to underlet is proved; nor is there any fact proved from which an underletting could fairly be inferred. It was a ground of forfeiture of the term if Ingraham & Co. let or underlet without the written consent of the plaintiff, and no such consent is pretended. It cannot be presumed that the defendants and Ingraham & Co. designed to make a transfer of the lease or of the term, in a way which *eo instanti* forfeited it, if there was any other mode in which the defendants could acquire the possession that would not produce such a result. If we are permitted to indulge in presumption, then the presumption upon the facts proved would be that the transfer to the defendants was by assignment, and not by underletting. The defendants held for the whole residue of the unexpired term of the lease, commencing in February, 1856. When the transfer is of the whole of a term, the person taking is an assignee, and not an under-tenant, although there is in form an underletting. It is essential to an under-tenancy that it be of a part only of the unexpired term.

In Woodfall's Landlord and Tenant, 345, it is said "an assignment, as contradistinguished from an under-lease, signifies a parting with the whole term." Again, at page 358 of the same author, it is said "an under-lease of the whole term amounts to an assignment." In 1 Hilliard's Abridgment, 126, sec. 55, it is said "the ordinary distinction between an assignment and an under-lease is, that the former transfers the land for the whole term; the latter for only part of it."

In the absence of any evidence of the bargain under which the defendants entered into possession, and it being shown that they occupied the whole of the unexpired term of the lease to Ingraham & Co., the fair presumption is that they entered for the whole of such unexpired term; and as such interest is given, not by an under-lease, but by an assignment, the presumption must be that the defendants were in as assignees, and not as under-tenants. But if they were in as under-tenants, they would not be liable to the plaintiff for the rent, either in an action on the lease or for use and occupation:

Woodfall's Landlord and Tenant, 858; 1 Ch. Pl. 88; Taylor's Landlord and Tenant, sec. 448.

2. Were the defendants assignees of the lease? The defendants were in possession, having the lease from the plaintiff to Ingraham in their hands, and they paid the rent to the plaintiff upon that lease for the benefit of Ingraham & Co. When to these considerations are added the reasons assigned under the foregoing proposition, why the defendants were assignees, and not under-tenants, the conclusion would seem to follow that the defendants were assignees of the term; they occupied for the whole residue of the term, and there is no evidence of a holding in any other character. Under these circumstances, the law presumes the defendants in as assignees of the lease: *Acker v. Witherell*, 4 Hill, 112; Taylor's Landlord and Tenant, sec. 429.

In *Quackenboss v. Clarke*, 12 Wend. 555, Clarke sued Quackenboss for rent as assignee of a lease given by him to one Washington. The defendant denied the assignment. And on the trial it was shown that the lessee had sold his interest to one Hardy, but did not execute an assignment to him; that Hardy sold his interest to the defendant, delivered to him the lease, but did not execute an assignment. There was a verdict for the plaintiff, and the defendant brought error. Savage, C. J., delivering the judgment of the court, says: "The fact of possession is sufficient evidence of an assignment in the first instance. . The fact of an assignment is a transaction between the defendant and the lessee, of which the plaintiff is not cognizant, but the defendant is. There is no hardship, therefore, in concluding him by his possession, unless he discloses the true state of his title." The same was held in *Armstrong v. Wheeler*, 9 Cow. 88, and in *Williams v. Woodard*, 2 Wend. 487, and these cases rest on 2 Phill. Ev. 150.

In 2 Phill. Ev. 150, the doctrine is stated more fully. The learned author says: "When the action is brought against the defendant as assignee of the term, and the issue is on the assignment, it will be enough for the plaintiff to give general evidence, from which the assignment may be inferred, or that the defendant is in possession of the demised premises, or has paid rent. Payment of rent by the defendant to the plaintiff, when the defendant has been let into possession by the original lessee, is *prima facie* evidence of the assignment of the whole term. . . . The defendant who is charged as assignee of a term is at liberty, in an issue on the assignment, to show that

he holds the premises as under-tenant to the lessee, and not as assignee."

Every fact was proved in this case required to establish an assignment to the defendants of the term. And they gave no evidence to rebut or overcome the *prima facie* case thus made against them. Under the statute of frauds the assignment of a lease must be made in writing, or it is void. If there was in fact no assignment in this case, the defendants could not be made liable. But as the law infers an assignment from certain facts proved, the inference must be of a valid operative assignment, such a one as was sufficient to transfer the term. It was incumbent on the defendants to prove, either that there was no assignment, or that it was one void in law.

Instead of making such proof, they have satisfied themselves with the case as made by the plaintiff, and as that case fixes their liability, they should not complain.

The defendants being assignees, they were liable, on the lease, for the rent. The covenant to pay rent runs with the land and binds the assignee, even though he is not named in it: *Jacques v. Short*, 20 Barb. 269; *Verplanck v. Wright*, 23 Wend. 506; *Allen v. Culver*, 3 Denio, 284; Woodfall's Landlord and Tenant, 278. It seems to me, therefore, the defendants must be deemed assignees of the lease, and liable as such.

The pleadings are not framed to charge the defendants in that character. The complaint claimed to recover for use and occupation, disregarding altogether the lease to Ingraham & Co., and a transfer thereof to the defendants. When the whole evidence was out, it was established that the plaintiff could not recover for use and occupation. They must recover, if at all, upon the covenants in the lease. And the question now is, Was the court at liberty, on the trial, to amend the complaint so as to conform it to the proof, or was there such a failure of proof as defeated altogether a recovery. To permit a recovery in this case is to carry the right of amendment as far, it seems to me, as it is possible to carry it, and not overlook altogether the great end and aim of all pleading, which is to inform the opposite party of the cause of action or defense which he is called upon to meet.

The courts have been very liberal in giving effect to the provision of the code that permits variances to be disregarded, and amendments to be made conforming pleadings to proofs. In *Robinson v. Wheeler*, 25 N. Y. 252, the complaint charged that the defendant had set fire to and destroyed a wood-shed

on premises of which he owned the reversion. On the trial it was proved that the building was destroyed by the negligence of the defendant, and the plaintiff was permitted to recover.

In *Byrbie v. Wood*, 24 N. Y. 607, the plaintiff claimed to recover for money obtained from him by fraud. The fraud was not found by the referee, yet the plaintiff was held entitled to recover.

In *Harpending v. Shoemaker*, 37 Barb. 270, the action was for money had and received, etc. On the trial the plaintiff offered to prove that the defendant had unlawfully taken and converted his property, sold it, and received the avails. The evidence was held competent, and the plaintiff was permitted to recover.

In all these cases, the plaintiff was permitted to recover on a case essentially different in its facts from that stated in the complaint. And it seems to me it would be giving effect only to the principle on which these cases were decided to hold that the plaintiff in this case was entitled to recover the rent due on the lease, notwithstanding the action is for the value of the use and occupation.

Aside from the principle on which such a recovery may be supported, the circumstances of the case justify the court in permitting the plaintiff to take judgment for the rent: 1. The amount claimed and recovered is the rent due by virtue of the lease; 2. The plaintiff, on the proof given by him when he rested, was entitled to recover for use and occupation. And it was the defendants' proof of the lease that produced the difficulty in the case. Even the grounds of this defense are not set out in the pleadings. He was not surprised. He held in his own hands the evidence which defeated an action for use and occupation, and which authorized a recovery on the lease.

While I entertain serious doubts whether the principles on which the right of recovery in this case must rest will not be the source of trouble in trials at the circuit, yet I do not think it is carrying the right of amendment further than has been done in the case cited. I am therefore in favor of affirming the judgment as a recovery on the lease, it not being suggested that the defendants were surprised.

3. Were the defendants tenants of the plaintiff, and as such liable for use and occupation? A lease to Ingraham & Co., which had two years to run from the entry of the defendants, being proved, it was incumbent on the plaintiff to prove it

surrendered, so that he was at liberty to relet the premises. And if a surrender in law is proved, the defendants are liable for the rent.

A surrender is defined to be the resignation of a particular estate for life or for years to him in the immediate reversion or remainder: Com. Dig., tit. Surrender, A. The surrender may be made by deed, conveyance in writing, or by act or operation of law: 3 R. S. 220, sec. 6.

If there is a surrender in this case, it is by act or operation of law,—there being no deed or conveyance in writing shown or pretended.

There is a surrender by act or operation of law when the owner of a particular estate has been party to some act the validity of which he is by law afterwards estopped from disputing, and a lien created which would not be valid if his particular estate had continued: *Springstein v. Schermerhorn*, 12 Johns. 357; *Van Rensselaer v. Penniman*, 6 Wend. 569; *Livingston v. Potts*, 16 Johns. 28.

In order that the second lease may operate as a surrender of the first, it is essential that the lease be a valid one. It was held in *Schieffelin v. Carpenter*, 15 Wend. 400, that a parol lease for more than a year to a third person, though he takes possession, will not operate as a surrender. The same rule was applied in *Whitney v. Meyers*, 1 Duer, 266.

It is not necessary that the second lease should be to the first lessee. If given to a third person, by the consent of the first lessee, it operates as a surrender.

In *Walls v. Atcheson*, 3 Bing. 462, S. C., 11 Eng. Com. L. 228, it was held that a landlord could not recover rent of his tenant where the latter had abandoned the premises during the term, and the landlord had let them to another not for the benefit of the original lessee. The acts of the parties were treated as a rescission of the agreement, and to have dispensed with a surrender: See same case in 2 Car. & P. 268; S. C., 12 Eng. Com. L. 565.

In *Nickells v. Atherstone*, 10 Q. B., 59 Eng. Com. L. 943, the plaintiff had let the premises to the defendant for three years. At the end of the first year the defendant quit, and wrote a letter to the plaintiff, in which he requested him to let the premises to some other person. The plaintiff did let them to another for three years, and the new tenant entered and paid two quarters' rent and became insolvent. The action was brought for the balance of the rent due by virtue of

the lease to the defendant after applying the amount paid by the new tenant. The question was submitted to the jury whether the plaintiff had accepted the new tenant in substitution and discharge of the defendant. The jury so found. The judge instructed them that if they so found, the verdict should be for the defendant. The plaintiff had leave to move for liberty to enter a verdict for himself, a rule nisi having been obtained. The court held that there was a surrender of the old lease by operation of law.

In *Smith v. Niver*, 2 Barb. 180, it was held by Harris, J., that where a landlord has consented to a change of tenancy, and has permitted a change of occupancy, and received rent from the new tenant as an original and not a subtenant, he cannot afterwards charge the original tenant for rent accruing during the occupation of the new tenant.

I have referred to these cases because they are the most favorable of any I can find to the plaintiff, and yet they do not go far enough to sustain this action against the defendants as holding directly from the plaintiff.

It will be seen that in all of the cases a mutual agreement between the lessor and the original lessee that the lease terminates must be shown. It is not necessary that the agreement should be express; it may be inferred from the conduct of the parties. The occupancy by some other than the lessee is of course a circumstance to show a surrender; but as the new occupant may enter as the tenant of the lessee, or as his assignee, or even as a trespasser, and thus his occupancy be consistent with the continuance of the first lease, it is absolutely essential that it should be clearly proved that the original lessee assented to the termination of his term. In short, it must be proved that the lessor and lessee mutually agreed to a surrender of the term, and that proved, the original tenant is no longer liable, but the new tenant (if there is one) is liable.

What evidence is there in this case of an assent by Ingraham & Co. to a surrender of their lease? No witness has testified directly to any such fact. It does not appear that they and the plaintiff ever spoke together upon the subject. The fact that the defendants held their counterpart of the lease, that they (Ingraham & Co.) quit possession, and that the defendants entered, occupied, and paid rent, and even claimed to be tenants, is entirely consistent with a continuance of the original lease and occupancy by the defendants as under-tenants or assignees of the lessees.

There is not a particle of proof that Ingraham & Co. have ever consented to a letting by the plaintiff to the defendants, or even that they knew that any such thing was contemplated.

For aught that appears in this case, the defendants are liable to Ingraham & Co. for the rent of the premises during the whole period they were in possession.

In *Drury Lane Co. v. Chapman*, 1 Car. & K. 14, it appeared that the plaintiffs had rented certain counters in the saloon of the theater to Mrs. Chapman, mother of the defendant, for some years; she entered, and occupied less than a year, and died. The defendant applied to the plaintiffs to take him as their tenant, and they accepted, and he entered and paid rent for a part of the term. The plaintiffs sued him to recover for the use and occupation of the premises. The defendant put in evidence the lease to his mother and letters on her estate to another son. The court put it to the jury to say whether the defendant entered under a new contract with the plaintiffs for the use of the premises, or whether he entered under the lease to his mother. The jury found he entered under a new agreement, and there was a verdict for the plaintiff. The court refused a rule to show cause why there should not be a new trial. If this case was rightly decided, it follows that it is wholly immaterial whether there is an outstanding lease when the new agreement is made. It is enough if the plaintiff is able to prove the new agreement; the defendant is then estopped from disputing his title. In the case cited, it is obvious that by the death of Mrs. Chapman her lease was not annulled. It passed to her representatives, who were entitled to the use and occupation of the premises, and the defendant was in law liable to them. In *Doe v. Wood*, 14 Man. & G. 681, H. had leased certain premises of Lady H., and died, leaving a widow. She continued to occupy and pay rent to Lady H. J. H. took out letters of administration on H.'s estate, and after such letters taken, the widow, with the knowledge of the administrator, occupied and paid rent to Lady H., and he never objected to such payment or made demand for the rent. The administrator brought ejectment against the widow and her second husband, and it was held that there was no evidence of surrender, by operation of law, so as to create the relation of landlord and tenant between Lady H. and the widow, and the plaintiff recovered.

These two cases cannot stand together. The first is in utter

disregard of the well-settled rule that the lessor cannot recover against a third person for the use and occupation of premises unless he shows a surrender of the original lease. In the case last cited it is quite clear that there ought not to have been a recovery if the widow was the tenant of Lady H.

There may be a recovery by the original lessor against a third person who enters during the running of a lease, under an express agreement with such lessor for the occupancy, when this entry is under such contract exclusively, and has no connection whatever with the original lease; and when the original lessee has omitted to assert any claim to the premises, or for the rent thereof. In such case the new tenant may properly be held estopped from disputing the title of his lessor: *Phipps v. Sculthorpe*, 1 Barn. & Ald. 50.

But in this case the tenants insist that they entered under Ingraham & Co., and show the lease, and prove payment of rent by them on the original lease, for the benefit of the original lessees:

Believing the defendants are liable, as assignees of the term, for the rent claimed, I am in favor of affirming the judgment, with costs.

DAVIES, WRIGHT, SELDEN, and HOGEBOM, JJ., were also for affirmance.

DENIO, C. J., filed an opinion for reversal.

JOHNSON, J., was also for reversal.

Judgment affirmed.

DENIO, C. J., thought that the judgment could not be affirmed consistently with the rules of the law. He was of the opinion that the evidence was perhaps sufficient to charge the defendants as assignees of Ingraham & Co., although the receipts for rent raised some doubt on that point, but that it was a conclusive objection to a recovery on that ground that the action was not upon the lease, but upon an independent letting by the plaintiff to the defendants; and if the difficulty arising out of the pleadings could be obviated by conforming them, under the code, to the proofs, the same difficulty would be presented by the charge of the judge, by which the jury were instructed that the plaintiff could not recover, except upon the ground of an independent letting by him to the defendants. The question then to be considered was whether there was such evidence of a letting by the plaintiff to the defendants as was suitable to be submitted to the jury. The chief justice was of the opinion that there was not.

INGRAHAM, J., thought that there was no evidence showing a surrender of the lease to Ingraham & Co. The presumption was that the lease continued in force; and this presumption was sustained by the receipts given by the plain-

tiff to the defendants for rent. There could be, then, no implied hiring between the plaintiff and the defendants.

ASSIGNMENT IS TRANSFER BY LESSEE OF ENTIRE ESTATE, WHILE SUBLET-
TING IS TRANSFER OF BUT PART: Note to *Fullon v. Stuart*, 15 Am. Dec. 545;
Childs v. Clark, 49 Id. 164; *Post v. Kearney*, 51 Id. 303, and note. The prin-
cipal case is cited to this point in *Woodhull v. Rosenthal*, 61 N. Y. 391, 392;
Stewart v. Long Island R. R., 102 Id. 609; *Constantine v. Wake*, 1 Sweeny,
251. But the circumstance of accepting rent from the assignee of a lease
does not discharge the lessee: *Durand v. Curtis*, 57 N. Y. 13, per Reynolds, C.,
citing the principal case. The principal case is distinguished in *Collins v.*
Hasbrouck, 56 Id. 163, in holding an instrument to be a sublease, and not an
assignment.

ASSIGNMENT WILL BE PRESUMED, in an action by the lessor, in the absence
of any evidence as to the agreement by which a party, other than the lessee,
entered into the possession of leased premises, if it is shown that he occupied
the whole of the unexpired term: *Constantine v. Wake*, 1 Sweeny, 251; *Mason*
v. Breslin, 2 Id. 393; S. C., 9 Abb. Pr., N. S., 434; especially if rent be paid
to the lessor: *Waller v. Thomas*, 42 How. Pr. 347; *Wright v. Kelly*, 4 Lans. 61.
Possession is evidence of an assignment in the first instance: *Coit v. Planer*, 4
Abb. Pr., N. S., 145; S. C., 7 Robt. 416. The onus is on the defendant to
prove, either that there was no assignment, or that it was void in law: *Kerno-*
chan v. Whiting, 10 Jones & S. 495. The principal case is cited to the forego-
ing points.

ASSIGNEE'S LIABILITY FOR RENT: See *Van Rensselaer v. Bradley*, 45 Am.
Dec. 451; *Childs v. Clark*, 49 Id. 164, and the notes thereto.

SURRENDER, WHAT AMOUNTS TO: See *Jackson v. Brownson*, 5 Am. Dec. 258.
It is not necessary that a surrender should be by express agreement: *Coe v.*
Hobby, 7 Hun, 160; *Dayton v. Crank*, 26 Minn. 136; *Fry v. Patridge*, 73 Ill.
53. It does not depend upon the doctrine of consideration, but upon the
intention of the parties: *Coe v. Hobby*, 7 Hun, 161. When parties make an-
other lease, valid as a contract, whether by parol or otherwise, inconsistent
in terms with the continuance of an existing lease, it operates as a surrender
of the latter: *Smith v. Kerr*, 33 Id. 572. The taking of a new lease by parol
is a surrender, provided it be a valid one, and pass an interest according to
the contract and the intention of the parties: *Coe v. Hobby*, 72 N. Y. 147.
The principal case is cited to the above propositions. See further, on the
question of surrender as being within the statute of fraud, *Lamar v. McNa-*
mee, 32 Am. Dec. 152; *Bailey v. Wells*, 76 Id. 233.

AMENDMENT CONFORMING PLEADING TO FACTS PROVED IS ALLOWABLE
UNDER CODE: *Smith v. Mackin*, 4 Lans. 46; and so a plaintiff may properly be
allowed to amend his complaint, upon the trial, by enlarging his claim for
damages: *Johnson v. Brown*, 57 Barb. 126; *Knapp v. Roche*, 5 Jones & S. 406,
all citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED in *Laughran v. Smith*, 75 N. Y. 211, to
the point that the question of variance cannot be raised on appeal; in *Johnson*
v. Hathorn, 2 Abb. App. 470, S. C., 2 Keyes, 485, 3 Id. 134, to the point that
where a plaintiff alleges facts entitling him both to legal and equitable relief,
and demands both, the court may award either that is appropriate to the case
made by the proof; and in *Welsh v. Schwyler*, 6 Daly, 413, to the point that a
verbal assignment of a lease for three years is inoperative and void.

BROWN v. BOWEN.

[30 NEW YORK, 512.]

MILL-OWNERS ARE ENTITLED TO RECOVER DAMAGES FOR INJURY CAUSED BY ERECTION OF DAM BELOW by riparian proprietors, setting back water upon the wheels of the mills, where such mill-owners were at the time in the actual use and occupation of the premises upon which the mills were located, and they and those under whom they claimed had been in possession thereof a number of years prior to the erection of the dam.

EACH RIPARIAN PROPRIETOR HAS RIGHT TO USE WATERS OF STREAM ON HIS OWN PREMISES for any purpose for which it may be legitimately used, and no one has the right by any erection on his own premises to interfere with such enjoyment to the prejudice of another; although, it seems, where proprietors draw water from the same dam, each has the right to continue to use the water, whatever may be the effect on another, unless the latter has acquired by grant or prescription the right to an exclusive use, or to use whenever there is not water enough for both.

OCCUPANT OF PREMISES INJURED BY SETTING BACK WATER THEREON IS ENTITLED TO RECOVER DAMAGES against the wrong-doer to an amount sufficient to indemnify him for the injury to such interest as he had in the premises.

ALLEGATION THAT PLAINTIFFS ARE JOINT OWNERS OF MILLS MUST BE PROVED, in an action to recover damages for an injury sustained by them from setting back water by means of a dam erected below.

POSSESSION OF PREMISES BY PLAINTIFFS WILL BE PRESUMED TO BE LAWFUL, entitling them to recover damages for an injury sustained by them from setting back water by means of a dam erected below by the defendants, where both parties asserted title at the time to the premises, but the defendants occupied the premises adjoining, and never previously made claim to the premises occupied by the plaintiffs.

EVIDENCE, ALTHOUGH LOOSE, IS SUFFICIENT ON WHICH TO REST ESTOPPEL, where the plaintiffs in an action to recover damages for an injury sustained by them from setting back water by means of a dam erected below, showed that the defendants' ancestor, under whom the defendants claimed, was present when one of the plaintiffs purchased the premises, and that he did not claim that he owned the land, but said that he had come to buy it.

TO ESTABLISH ESTOPPEL IN PARS IT MUST BE SHOWN, that the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give, or the title he proposes to set up; that the other party has acted upon or been influenced by such act or declaration; and that the party will be prejudiced by allowing the truth of the admission to be disproved.

IT IS FOR JURY TO SAY, WHETHER ON FACTS, ESSENTIAL PARTS OF ESTOPPEL ARE PROVED, in the absence of proof of the effect of the admission on the party setting up the estoppel.

ESTOPPEL IS CONSTITUTED BY DEFENDANTS' OMISSION TO ASSERT TITLE, where, in an action to recover damages for an injury sustained by setting back water by means of a dam erected below, it was shown that the defendants and their ancestor had omitted to assert title to the premises in question, although knowing the premises to belong to them, and that the

plaintiffs had purchased the premises and were making valuable permanent improvements thereon in the belief that they owned them.

NEW TRIAL WILL NOT BE GRANTED when it is seen that the facts cannot be changed, and the fact proved is conclusive of the case.

JOINT ACTION ONLY CAN BE MAINTAINED TO RECOVER DAMAGES FOR INJURY SUSTAINED BY SETTING BACK WATER by means of a dam erected below, where the plaintiffs were in partnership prior to and at the time when the dam was built.

ACTION CAN BE MAINTAINED TO RECOVER DAMAGES FOR INJURY SUSTAINED BY SETTING BACK WATER by means of a dam erected below, where the plaintiffs consented to the building of the dam, but the consent was given on the condition that the work should be so done as not to injure the plaintiffs, and the work was so imperfectly done that the current of the stream was impeded, and the water did not flow off, but set back on the plaintiffs' wheels.

ACTION by Edward Brown and Daniel Brown against Wells H. Bowen and James K. Bowen, to recover damages for an injury sustained by setting back water on the plaintiffs' mills by means of a wing-dam erected below on the river by the defendants. The complaint alleged that the defendants were joint owners of the mills. The defendants separately denied the complaint. Wells H. Bowen denied that the plaintiffs had the rightful possession of the premises, or that the plaintiffs were the owners thereof, and alleged that the premises belonged to the defendants. He also alleged that the dam was built with the consent and assistance of the plaintiffs. It appeared that the defendants' father, Luther Bowen, then the owner of the premises in question, made a deed thereof, September 14, 1829, to Samuel and William Messenger. These grantees, on the same day, executed back to Luther Bowen a mortgage of the premises. This mortgage was foreclosed, and a sale made thereunder to Luther Bowen, April 29, 1834. The defendants claimed title, by this chain, as the heirs at law of Luther Bowen. The plaintiffs showed that Luther Bowen was in possession in 1835, but abandoned the premises during that year. One Burr, who had taken possession, conveyed the premises to one Cooper. Cooper mortgaged them to one Taggart, and the premises were afterwards sold, under foreclosure of this mortgage, to one Sibley. Sibley made a deed to the plaintiff, Edward Brown, some time prior to 1847; and Brown went on and improved the premises by erecting buildings thereon. In 1847 he sold one half of his interest to the plaintiff, Daniel Brown, and from that time the plaintiffs were in partnership. In 1850 the dam in question was built. The jury found a verdict in favor of the defendant James K.

Bowen, and against the defendant Wells H. Bowen, in favor of the plaintiffs. Judgment was accordingly entered against Wells H. Bowen, who appealed to a general term of the supreme court. The general term affirmed the judgment, and he appealed to this court. Further facts are stated in the opinion.

B. F. Rexford, for the appellant.

D. Pratt, for the respondents.

By Court, MULLIN, J. The plaintiffs, at the time of the erection of the dam by the defendants, were in actual use and occupation of the premises on which the mills in question were located, and they and those under whom they claimed had been in possession of the same for quite a number of years prior to the erection of said dam. It was proved that the defendants erected the dam, and that by means of it the water had been set back upon the plaintiffs' wheels, thereby reducing the power thereof, and injuring the plaintiffs' mills. It cannot be denied that if these were the only facts in the case the plaintiffs would be entitled to recover. Each of the parties had the right to use the waters of the stream on his own premises for any purpose for which it might be legitimately used, and neither had the right, by any erection on his own premises, to interfere with such enjoyment to the prejudice of such other: Angell on Watercourses, sec. 340. The only exception to this rule that now occurs to me is, that where both parties draw water from the same dam, each has the right to continue to use the water, whatever the effect may be on the other, unless such other has acquired by grant or prescription the right to an exclusive use, or to use whenever there is not water enough for both.

The learned author says (sec. 340, cited *supra*): "The maxim, *Sic utere tuo*, etc., applies as well to setting back the water of a watercourse above the owner's land in the natural channel of the stream as it does to an actual overflow of land. . . . No single proprietor, without consent, has a right to make use of the flow in such manner as will be to the prejudice of any other; and that he has no more power to apply it to a purpose which occasions a return of the water on the land above than he has to cause a diminution of the quantity below. He cannot alter the level of the water, either where it enters or where it leaves his property."

Bayley, J., in *Saunders v. Newman*, 1 Barn. & Ald. 258,

says: "If a person stops the current of a stream which has immemorially flowed in a given direction, and thereby prejudices another, he subjects himself to an action."

"Any impediment," say the supreme court of Pennsylvania, "in the stream, caused by the defendant's dam, by which the plaintiff's mill is stopped from grinding in any state of the water, or is made to grind slower or worse than it otherwise would, is an injury for which the plaintiff would be entitled to damages." But it is unnecessary to cite authorities; the principle has been recognized too long to admit of controversy at this day.

The acts done by the defendants being *prima facie* actionable, it is necessary, in the next place, to ascertain whether the plaintiffs could, under the circumstances, maintain an action for the damages resulting from the injury. Before the code, the remedy of the injured party was by an action on the case: Angell on Watercourses, sec. 395. That form of action could be maintained by his tenant in possession, and by the landlord or reversioner: *Id.* Title was not necessary, unless the plaintiffs sought to recover full damages for the injury to their property. From the very nature and necessity of the case a temporary occupant must be entitled to sue; and as such occupant could only recover damages sufficient to compensate him for the injury sustained, an action must also be given to the reversioner, or the party sustaining perhaps the largest amount of damages would be left remediless.

It follows that the plaintiffs would be entitled in this case to damages to an amount sufficient to indemnify for the injury to such interest as he had in the premises. But the plaintiffs in their complaint allege that they were joint owners of the mills, and they were bound to prove it. Possession is *prima facie* evidence of ownership of real estate. In 1 Cowen and Hill's Notes, 353, it is said: "The mere possession of property, however recent, will enable the occupant to recover or defend against a stranger in ejectment, trespass," etc.

But the defendants showed title in their ancestor subsequent to the deed from their ancestor to Messenger, and no title is shown out of him. It appears, however, that several persons were in possession after Luther Bowen left possession in 1835, and before the defendants went in. The defendants occupied the premises adjoining, and never made claim to the premises occupied by the plaintiffs. Under these circumstances, it seems to me that the law will presume the plaintiffs

lawfully in possession, and entitled to recover damages for the injury sustained by them.

The plaintiffs, to prevent the defendants from alleging title to the premises, showed that the defendants' father was in the office at the time Edward Brown, one of the plaintiffs, purchased the premises on which the plaintiffs' mills are located, and something was said in presence of Bowen about Brown having bought the land. The witness's impression was that Bowen said he had come to buy the land; he did not claim that he owned it. This is very loose evidence on which to rest an estoppel; but it cannot be said that it is not some evidence, and sufficient, had it been submitted to the jury, to support a verdict finding the estoppel. The court was not requested to submit the question to the jury, and at the close of the plaintiffs' case, and after the defendants had put in their documentary evidence, "the court decided that, as the evidence then stood, the defendants were estopped as matter of law from claiming the plaintiffs' premises, so far as the damage had been done to the plaintiffs' mills by the dam"; to which ruling the defendants' counsel excepted. At the time this decision was made, no question could be submitted to the jury; the defendants had not as yet given any parol proof, and I cannot discover that the learned judge decided anything. It was an intimation to the defendants' counsel that if they did not give evidence that would do away with the plaintiffs' evidence on the subject of estoppel, he would hold them estopped. The direction affected the rights of neither party, and unless the question is presented again in some other part of the record, the defendant must fail in attacking the judgment on this branch of the case. But the judge did charge that the defendants were estopped from setting up and relying upon their title to the premises as a defense to the action; to which charge the defendants' counsel excepted.

Under this charge the jury were not at liberty to consider the question of estoppel as a question of fact. They were bound to consider the case on the assumption that as matter of law the defendants were estopped from asserting title to the premises. In this the court erred. The question belonged to the jury, and should have been submitted to them as a question of fact. But the defendant acquiesced in its being withheld, but insisted the instruction was wrong as a legal proposition. There was no dispute about the facts, and ordinarily it would be a question of law whether the facts proved

established the proposition to establish which they were proved. And it was due to the court that his attention should have been called to the distinctions, if any, which made it peculiarly proper to submit the question whether or not an estoppel was proved to the jury. To establish an estoppel *in pais*, it must be shown: 1. That the person sought to be estopped has made an admission or done an act, with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposed to give or the title he proposes to set up; 2. That the other party had acted upon or been influenced by such act or declaration; 3. That the party will be prejudiced by allowing the truth of the admission to be disproved: *Plumb v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 392 [72 Am. Dec. 526]. In the absence of proof of the effect of the admission on the party setting up the estoppel, it is for the jury to say whether on the facts the several essential parts of the estoppel are proved. It is quite probable that had the attention of the court been so called to the reasons why in this case the question should be given to the jury, he would have submitted it to them, as I think it was proper for him to do.

It would seem that the attention of neither court nor counsel was drawn on the trial to the important estoppel that was proved in the case,—which was the omission by the defendants and their ancestor to assert title to the premises in question, although knowing the premises to belong to them, and that the plaintiffs, or one of them, had purchased them, and was making valuable permanent improvements thereon, in the belief that they, and not the defendants or their father, owned them. That this silence—this omission to assert title—constitutes an estoppel, there can be no dispute: *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Town v. Needham*, 3 Paige, 545 [24 Am. Dec. 246]; *Storrs v. Barker*, 6 Johns. Ch. 166 [10 Am. Dec. 316]; *Thompson v. Blanchard*, 4 N. Y. 303.

No evidence can be given that can do away with the force of the estoppel, and a new trial will not be granted when it is seen that the facts cannot be changed, and the fact proved is conclusive of the case.

Unless some error can be found, other than the omission to submit the question of estoppel to the jury, the judgment should be affirmed.

If the defendants were estopped, then the plaintiffs were entitled to damages as owners of the premises.

The appellant's counsel moved for a nonsuit on five grounds: 1. That no cause of action had been proved against James K. Bowen, and he should be discharged; 2. A joint action for the matters sued for cannot be sustained, even though separate actions might be brought; 3. The deeds under which the plaintiffs claim are void, because Luther Bowen or the defendants were in the adverse possession; 4. There is no evidence that the plaintiffs' deeds cover the premises in question; 5. The plaintiffs gave permission to build the dam, and cannot, therefore, maintain trespass or trover.

The motion was overruled, and the defendants' counsel excepted.

But two of these grounds are relied on by the appellants in this court. Those are the second and fifth, and these alone require attention: 1. Edward Brown is the person who made the purchase of the premises some time prior to 1847, and went on and improved them by erecting buildings thereon. In 1847 he sold half to the other plaintiff, and from that time they had been in partnership. In 1850 the wing-dam in question was built. It was by means of that erection the plaintiffs were damnified. It is a mistake, therefore, to say that the plaintiffs did not jointly sustain injury. There was no separate injury. 2. That the dam was built with the consent of the plaintiffs.

It is true, the dam was built with the assent of the plaintiffs, and it is quite probable one of them may have aided in the work. But it is to be borne in mind that the defendants needed no consent from the plaintiffs to authorize them to build a dam on their own side of the river on their own land, provided that such dam caused no damage to the plaintiffs' property. If a temporary suspension of the mills was necessary in order to enable the defendants to perform the work, the plaintiffs' consent would be needed. If the defendants proposed to so build the dam as to set the water back on the plaintiffs' wheels, it is difficult to comprehend why the plaintiffs should not only consent to the erection of the dam, but aid in the work, without consideration, or even a motive for so doing. The probability is, and the jury have found the fact to be, that the consent and aid of the plaintiffs were given on the condition that the work should be so done as not to injure the plaintiffs. There would not seem to be any difficulty in so doing it, had the defendants been disposed to so do the work. By clearing out the new channel, into which the water

was thereafter to flow, backwater could have been as effectually prevented as by continuing it in the old channel. The work of clearing the new channel was only partially carried out, and the result was as might have been anticipated it would be; the current was impeded, the water did not flow off, and as a consequence, set back on the plaintiffs' wheels. It is quite obvious, also, that the mischief would be constantly aggravated. The earth and stone brought down by the current would have a tendency to deposit itself as soon as the force of the current was lessened, and thus in a short time the bed of the stream filled, and the injury from backwater permanently increased. The condition on which the consent was given not being performed, the consent or license was no longer binding on the plaintiffs, and the dam from that time became a nuisance, and the defendants liable for the injury it caused the plaintiffs.

It is said that the remedy of the plaintiffs is an action for breach of the agreement by the plaintiffs to so build the dam as not to injure the plaintiffs. Technically, there was no such agreement; although, doubtless, the law might imply one if it was necessary to prevent injustice, but the parties did not understand that the rights of either party rested in agreement. The acts and assent of the plaintiffs might be considered a parol license on condition, which condition has never been performed, and hence the license fails. But the facts proved do not even make a case of parol license. A license is a bare authority to do a certain act, or series of acts, upon another's lands, without possessing any interest therein: Angell on Water-courses, sec. 285.

The consent, then, of the plaintiffs, and rendering aid in the work, can only operate against them by way of estoppel; and it cannot thus operate, because of the express condition on which such aid and assent were given. It seems to me, therefore, that the nonsuit was properly refused.

If the foregoing views are correct, they dispose of all the questions presented by the appellant's counsel.

My conclusions, then, are: 1. That on the evidence, the plaintiffs are owners of the mills in question; 2. That by the wrongful acts of one of the defendants, injury has been done to said plaintiffs; 3. That if, on the evidence, ownership by the defendants is proved, yet the plaintiffs are entitled to recover on their presumed lawful possession of the mills, even if such possession is to be presumed to be as tenants of the de-

fendants; 4. But the defendants are estopped from disputing the ownership of the plaintiffs by reason of their omission to assert title to the lands, knowing that the plaintiffs were acquiring title to them, and making expensive improvements thereon, as owners, in ignorance of any claim thereto by the defendants; 5. That the foregoing ground of estoppel is so clearly established, and so conclusive on the defendants, that it would be useless to send the case back for a new trial; 6. But if the judges are of opinion that the case must rest here, on the ground of estoppel taken in the court below, and that the others not being suggested, these cannot be considered here, then I am of the opinion that although technically it was the duty of the defendant to have requested the court to submit the question of estoppel to the jury, yet the evidence is so slight on the question that I would be in favor of ordering a new trial on that ground alone; 7. Not discovering any answer to the other ground of estoppel, I am in favor of affirming the judgment, with costs.

All the judges concurred.

Judgment affirmed.

RIPARIAN PROPRIETOR'S RIGHT TO USE WATERS OF STREAM: See *Davis v. Getchell*, 79 Am. Dec. 636, and note considering the subject; *Davis v. Winslow*, 81 Id. 573; *Rhodes v. Whitehead*, 84 Id. 631. Mill-owners upon the banks of an unnavigable stream are entitled to the uninterrupted flow of the water in the channel of the stream, contiguous to their respective premises, as it had been accustomed to flow: *Smith v. City of Rochester*, 92 N. Y. 473; but a riparian proprietor is entitled to a reasonable use of the stream: *State v. Pottmeyer*, 33 Ind. 405; *Dodge v. Berry*, 26 Hun, 247; so a polder of waters has a right to make any use thereof not inconsistent with the rights of the owners below: *Myer v. Whitaker*, 55 How. Pr. 383; S. C., 5 Abb. N. C. 181. The principal case is cited to the foregoing points.

OWNER OF DAM MAY BE LIABLE FOR FLOWING BACK WATER: *McCoy v. Danley*, 57 Am. Dec. 680, and note discussing the subject; *Bassett v. Salisbury Manufacturing Co.*, 82 Id. 179.

ESTOPPEL IN PARI, WHEN ARISES: See *Drew v. Kimball*, 80 Am. Dec. 163; *Driskell v. Mateer*, 80 Id. 105; *Stinchfield v. Emerson*, 83 Id. 524; *Windle v. Canaday*, 83 Id. 348; *Ray v. McMurtry*, 83 Id. 322; *Beardsley v. Foot*, 84 Id. 405, and the notes to these cases. An estoppel in pais is constituted by a representation made, or act done, with the knowledge that it might be acted upon, and subsequent action upon the faith of it to such an extent that it would be productive of injury if allowed to be retracted: *Armour v. Michigan Central R. R.*, 65 N. Y. 123; *Finnegan v. Carraker*, 47 Id. 500; *Muller v. Pondir*, 55 Id. 335; *Victor v. International Nav. Co.*, 13 Jones & S. 143; *Mattoon v. Young*, 2 Hun, 566; S. C., 5 Thomp. & C. 118, per Muller, J., dissenting; and see *Graham v. Fitzgerald*, 4 Daly, 181. The principal case is cited to this propo-

sition; and the rule applied in *Ridge v. Baker*, 57 N. Y. 220, to a case where expenditures were made on the land on the faith of the owner's representations; but see *Wiseman v. Luckeinger*, 84 Id. 39, 40; and in *Mattoon v. Young*, 2 Hun, 562, 8. C., 5 Thomp. & C. 114, to the matter of the title itself. If not prejudiced by the truth, a person cannot set up an estoppel: *Ryder v. Commonwealth F. Ins. Co.*, 52 Barb. 449, referring to the principal case.

THE PRINCIPAL CASE IS ALSO CITED in *Miller v. Long Island R. R.*, 9 Hun, 195, to the point that possession of land is sufficient to enable a party to recover against a defendant in trespass; and in *Adams v. Conover*, 87 N. Y. 428, to the point that a nuisance may be lawfully abated.

MICHAELS v. NEW YORK CENTRAL R. R. Co.

[30 NEW YORK, 564.]

ACT OF GOD, EXEMPTING COMMON CARRIER FROM LIABILITY FOR INJURY TO OR LOSS OF GOODS, is an act occasioned exclusively by natural causes, such as could not be prevented by human care, skill, and foresight. *Per Wright, J.*

ACT OF GOD, TO EXCUSE COMMON CARRIER, MUST BE SOLE AND IMMEDIATE CAUSE OF INJURY. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, an act of God. *Per Wright, J.*

COMMON CARRIER IS RESPONSIBLE FOR ALL INJURIES TO GOODS intrusted to him for transportation while under his care and control, except injuries caused by act of God or public enemies.

COMMON CARRIER IS RESPONSIBLE FOR INJURY TO GOODS BY ACT OF GOD, if he departs from his line of duty, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God, which would not otherwise have produced the injury.

COMMON CARRIER IS UNDER DUTY TO FORWARD IMMEDIATELY GOODS RECEIVED BY IT from a connecting line to be transported to the owners, and cannot justify a detention on the ground that by its regulations goods received from a connecting line are not to be forwarded until the receipt of a bill of back charges, and that no such bill accompanied the goods.

COMMON CARRIER IS RESPONSIBLE FOR INJURY TO GOODS BY ACT OF GOD, where the goods were exposed to injury by the carrier's inexcusable detention.

ACTION against the defendant as a common carrier. The facts are fully stated in the opinions.

S. T. Fairchild, for the appellant.

C. K. Smith, for the respondent.

By Court, **WRIGHT, J.** The duty and liability of a carrier begins when the goods are received into his custody for transportation, and ends when they are securely and safely carried and delivered to the owner. He is responsible for every injury sus-

tained by them occasioned by any means whatever, except only the act of God or the public enemies. On the 5th of February, 1857, the defendants, as carriers, and not as warehousemen, received at Albany, to be transported to Rochester, a box containing cloths and velvets belonging to the plaintiffs, and twelve days afterwards delivered the property at Rochester in a wet and damaged condition. For this injury they were liable, unless it was occasioned by one or the other of the causes which legally excuse them. A ground of defense was, that the injury was by the act of God, and not by or through any negligence on their part. If the damages resulted from "the act of God" spoken of in the law of carriers, and the defendants were without fault, the court below was wrong in adjudging them liable. This is the principal, if not the only, question in the case.

There was no conflicting evidence, and neither party asked to go to the jury on any disputed fact. We are to see, then, what the case was as the evidence presented it. The box containing the goods damaged was one of three purchased together in the c.ty of New York, about the 1st of February, by the plaintiffs, who were merchants at Rochester. Two of the boxes came to the plaintiffs' hands over the defendants' railroad, not later than the 7th of February. The defendants admit that the three boxes were delivered to them at Albany on the 5th of February, to be transported to the city of Rochester; and the inference is almost irresistible that two of them were at once forwarded, and the third, by the negligence of the defendants' employees, left behind. The excuse offered for not forwarding the injured parcel was, that no bill of charges for transportation by the Hudson River Railroad Company accompanied it, and that it was one of the defendants' regulations, known to the latter company, to receive from it goods to be forwarded, but not to forward them until bills of back charges were furnished. It was not shown that there were any back charges, and some days after the goods had been damaged the defendants forwarded them without any expense bill. The defendants had at Albany eight buildings for the reception of freight to be carried, in one of which the damaged box was deposited. These buildings were situated near the docks upon Hudson River, and not, as subsequently appeared, out of the reach of a rise of water by damming the river with ice below the city in time of a freshet. On the 8th of February, and after the goods had been in possession of the

carrier three days at least, one of these freshets, not uncommon in the upper sources and tributaries of the Hudson and at Albany, occurred, breaking up the ice in the river, creating an ice obstruction at the overslaugh, and setting the increased volume of water back upon the lower streets of the city. There had been slight indications of this freshet at Albany the day before, but whether there had been on Sunday (on the night of which the flood reached its height), the case does not disclose. It is reasonable to presume that this must have been the case, as the water was rapidly rising at ten o'clock that night, and at twelve o'clock had reached the defendants' freight-houses, which were some thirteen feet above the ordinary tides in the river, and before it subsided, which was eight hours afterwards, had risen four feet in one of the buildings. This rise of water was an unusual and extraordinary one, the like of which had occurred at no period for thirty years previously. Except as against such a rise, the freight-house of the defendants was a safe and secure place to keep and protect goods, and at no time for thirty years had there been any rise or flood that would have damaged the plaintiffs' goods in the freight-buildings in which they were deposited. The goods were wet by this rise of the water and damaged. It seems that the defendants took no steps to protect the property against the probable effects of the rise after it had commenced, until about twelve o'clock on Sunday night, when their freight agent was first apprised by another employee that the river was rising rapidly towards the freight-house; but it appears quite clear that if at this time anything had been done in that direction the plaintiffs' goods would have escaped injury from the water. The freight agent did not go or send any person into building "B," where the goods were, on first visiting the freight-house, and the reason assigned was, that the building was surrounded by water. About one o'clock in the morning the water began falling, and fell three feet in half an hour. It had then risen but a little over the floor in building "B." Had the men at that time sent to the building raised the plaintiffs' box of goods from the floor, no injury would have occurred. Nothing, however, of the kind was done. The direction was to place the cars along by the floors of the freight-house, and load in the goods, but this was impracticable, because the tracks were blocked up with ice. Shortly thereafter the water commenced rising again, and continued to rise until seven or eight o'clock in the morning,

at which latter time it was about four feet in height in building "B." During this period, and while they were able to work there, some of the defendants' employees were engaged in raising the freight from the floor of the building. They laid the plaintiffs' box of goods on a piece of boiler iron placed across two barrels standing on end; which, if the same thing had been done before the second rise of water, would doubtless have avoided the injury.

This was, in substance, the case disclosed, and the question recurs whether the judge erred in holding the defendants liable. In other words, whether the defendants, as carriers, brought themselves within one of the two exceptions to their legal liability. What is precisely meant by the expression "act of God," as used in the case of carriers, has undergone discussion, but it is agreed that the notion of exception is those losses and injuries occasioned exclusively by natural causes, such as could not be prevented by human care, skill, and foresight. All the cases agree in requiring the entire exclusion of human agency from the cause of the injury or loss. If the loss or injury happen in any way through the agency of man, it cannot be considered the act of God; nor even if the act or negligence of man contributes to bring or leave the goods of the carrier under the operation of natural causes that work their injury, is he excused. In short, to excuse the carrier, the act of God, or *vis divina*, must be the sole and immediate cause of the injury. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the act of God: *McArthur v. Sears*, 21 Wend. 190; *Merritt v. Earle*, 31 Barb. 38; affirmed in this court, *Merritt v. Earle*, 29 N. Y. 115; *Smith v. Shepherd*, cited in Abbott on Shipping, 383; *Trent Navigation Co. v. Wood*, 3 Esp. 127; *Forward v. Pittard*, 1 Term Rep. 27; *Campbell v. Morse*, 1 Harp. 468; *McHenry v. Railroad Co.*, 4 Harr. (Del.) 448; *Siordet v. Hall*, 4 Bing. 607; *New Brunswick Steamboat Co. v. Tiers*, 24 N. J. L. 697 [64 Am. Dec. 394]; Edwards on Bailments, 454; Angell on Carriers, sec. 156.

The goods were damaged in this case in consequence of a freshet in the Hudson River, on the 8th and 9th of February. The ice was broken up, and lodged in the channel of the river, creating an obstruction to the flow of the water, and setting it back upon the lower part of the city, so that the rise was, in part at least, the result of the obstruction. The combined influences of the freshet and obstruction produced the rise of

water which wet the plaintiffs' goods. They were natural causes, of which the injury was not the direct but the remote consequence. Passing by, however, the question of remoteness of cause and effect, and attributing the damage directly to the rising of the water in the river, was such damage the act of God, in the legal sense of the term? On this point, I cannot entertain a doubt. There was too much of negligence on the part of the defendants, and too much of human agency creating or entering into the cause of the disaster, to bring the case within the exception to the carrier's absolute liability for the safety of property which he undertakes to carry. It was shown that there was a flood, — no unusual event at Albany, — which, in the nature of things, could not have been sudden and unforeseen, and the goods in question, being exposed to its effects, were injured. It is said to have been an extraordinary flood, the like of which had not occurred at Albany for thirty years previously. But suppose this were so; if the injury which the flood occasioned could have been avoided or prevented, or if the act or negligence of the defendants contributed to bring the property under the operation of the flood, or entered into the cause of the disaster, the injury cannot be considered the act of God. This cannot be done in any case, though the injury proceed directly from natural causes, where it might have been avoided by human prudence and foresight, or where human agency creates or enters into the cause of mischief. This extraordinary flood neither could or would have injured the goods of the plaintiffs had not the defendants, by their prior act or negligence, placed them in a situation to be affected by it. And so, also, the flood might have been foreseen, its effects averted, and the goods secured and saved, by the exercise of even ordinary care, skill, and foresight by the company or its servants. Had the company received the goods and deposited them outside instead of inside of their freight-house, and they had been injured by rain, this in a certain sense would have been an injury by an act of God, but no one would pretend that the company was not liable. A carrier is always liable for injuries resulting from his own negligence. Can it make any difference that the goods were in a freight-house that the experience of this freshet showed was located in a dangerous place, and the property in it in danger of destruction in times of high water? I think not. If the defendants misjudged in locating and erecting the building for the deposit of freight to be carried, and they placed it

within the reach of any possible effects of freshets, the fault was their own. It was not ordinary, but extraordinary, prudence which they were bound to exercise in guarding against the effects of any freshet that might possibly occur. Had the defendants left the goods in the open air, fully believing that it would not rain, and they had been injured by a storm, no one would doubt their liability; but I think such liability not more apparent than when they exposed them to the effects of a freshet in a freight-house within its reach, which they believed to be a safe place.

Suppose, however, the defendants were not guilty of negligence in placing their freight-house so near the river as not to have been out of the reach of this particular flood, still it was an act of theirs, and without which, and the further act of putting the goods in it, no injury would have resulted. Had it not been for human intervention no injury would have occurred by the rise of water. It is not enough that the act of God which shall excuse the carrier is a means, although not the direct and exclusive means, by which loss or injury is produced. In *Smith v. Shepherd*, cited in Abbott on Shipping, 385, where there was no actual negligence on the side of the defendant, the loss happened in this way: Just before the defendant's vessel reached the harbor of Hull, a bank there, formerly shelving, had been rendered precipitous by a great flood, where a vessel sunk by getting on the bank, having a floating mast tied to her. The defendant's vessel striking the mast was forced towards the bank, where, owing to a change in the bank occasioned by the flood, the loss happened. The natural cause—the act of God in changing the bank—was laid out of the question as not being the immediate cause, and therefore furnishing no excuse. The fastening of the mast, if not the sinking of the ship to which it was attached, were the only remaining causes, and one, if not both, were obstructions placed there by human agency. In *McArthur v. Sears*, 21 Wend. 190, human agency intervened to produce the loss, and the carrier was held responsible. Judge Cowen, in an able opinion, considers the meaning of the phrase “act of God,” as applied to a carrier's liability, and reaches the conclusion that it is restricted to the act of nature, and implies the entire exclusion of all human agency, whether of the carrier or of third persons. “No matter,” he says, “what degree of prudence may be exercised by the carrier and his servants, although the delusion by which it is baffled, or the force by which it is over-

come, be inevitable, yet if it be the result of human means the carrier is responsible." In *Campbell v. Morse*, 1 Harp. 468, where the wagon of the defendant, who was a common carrier, in which he was carrying goods for hire, stuck fast in fording a creek, and the water rising suddenly damaged the goods, it was adjudged that the defendant was liable for the damage so occasioned; for though the rising of the water was caused by the act of God, the placing of the goods in that situation was the act of man.

Again: the carrier is always liable for an injury resulting from his own negligence; and when that intervenes, he cannot discharge himself by showing that it was occasioned by one of those occurrences which are termed the "act of God." If by his negligence property committed to him is brought under the operation of natural causes that work its destruction, or is exposed to such cause of loss, he is responsible. So, also, if but for his neglect the injury would have been avoided. In the present case it plainly appears that but for the misconduct and negligence of the defendants no injury would have happened to the plaintiffs' goods. They detained the goods at Albany, without any reasonable excuse, until the flood came upon the lower part of the city, and then exposed them to its effects. It is not to be presumed that so extraordinary a flood as inundated the wharves and lower streets of the city on the 8th and 9th of February could have not been foreseen, and its effects upon the plaintiffs' property avoided. It must of necessity have taken some time for the freshet to have accumulated force enough to break up the ice, pile it up on the overslaugh, and inundate the city. That the flood came suddenly and without warning, or that there were no previous indications of the freshet, is not to be supposed. Yet no steps were taken to avoid its injurious effects upon goods deposited in the defendants' freight-houses until the water had reached the streets surrounding the houses. But even then it was not too late to have prevented the injury. The water had not reached the goods of the plaintiffs, and if then they had been attended to would have been saved from being damaged. The defendants' employees made no effort in that direction. Their freight agent, after waiting until the water surrounded the building in which the goods were before visiting the scene of the disaster, assigns that as a reason for not going himself or sending men to raise or remove the goods in that building. He remained about an hour in another building, doing nothing,

when the water commenced falling, and fell three feet in half an hour. Laborers were then sent to the building where the plaintiffs' box was deposited. The goods had not been damaged at this time, and had the box been raised from the floor, as it afterwards appears to have been, the goods would have escaped injury. But nothing was done to secure them. About twenty minutes after one o'clock the water commenced rising again, and continued to rise until seven or eight o'clock in the morning. This rise must have been comparatively slow, for it took seven hours to raise the water less than a foot in depth on the floor of the building where the damaged goods were. During all this time, and while the water was rising, no effort was made to secure the goods against injury; at least, not until it had occurred. Men did get into the building about the time the water commenced rising the second time, and the rising water should have warned them to do what was subsequently done after the goods had received the injury, namely, place the box upon the barrels two and a half feet above the floor. So that there was opportunity enough, if it had been improved, even after the defendants' employees reached the freight-house, to have secured and protected the property in question from injury. The defendants, by their own act or neglect, detained or brought the goods under the operation of the freshet, or natural cause; they negligently failed to foresee the freshet in time to have taken them beyond its reach; and after the freshet had appeared, though there was then sufficient time to secure them against injury, neglected to do so. Under these circumstances, it cannot be reasonably pretended that the defendants, as carriers, were excused from liability. To have excused them, the damage must have been exclusively the result of an act of God, and entirely free from the co-operation of man, which was not the case. By the acts or negligent conduct of the defendants, or the admixture of human means, the goods were brought under the operation of an act of God which worked the injury; and even the injury might have been avoided by ordinary care, prudence, and foresight. A carrier cannot fold his arms when property is intrusted to him, and because it is subjected to natural causes that may work its destruction, make no effort to save or protect it from such causes or agencies, and then claim to be exempted from liability. An injury occurring under the circumstances which this case discloses is in no legal sense an injury caused by the act of God.

Another ground on which the judge was requested to direct

a verdict for the defendants was, that the box of goods, at the time the injury was sustained, was in their possession in the character of warehousemen, and not as common carriers of goods. There is nothing in this point. The defendants, in their stipulation, admitted that they were common carriers, and as such, the box in question, with two others, was delivered to them at Albany, on the 5th of February, to be transported for hire from that place to the city of Rochester. There was not the shadow of proof in the case tending to show that the goods were in their custody as warehousemen when the injury occurred. It was attempted on the trial to excuse their negligence in transporting the goods to their place of destination, by showing that no bill of charges of the Hudson River Railroad Company, had been furnished, agreeably to a regulation of the defendants; but it was not claimed or pretended that the goods had been delivered to them, or were in their custody, otherwise than as carriers.

On the trial, the defendants were not allowed to show by their freight agent that it was the custom among forwarders at Albany to receive goods sent them by other forwarders, to be forwarded, unaccompanied by expense bills, and hold them in store until such bills were furnished. This was not error. Any such custom was entirely immaterial, and could not affect the rights of the parties. The defendants received the goods into their possession as carriers, on the 5th of February, and their liability as such forthwith attached, without regard to any custom prevailing among warehousemen or forwarders at Albany.

The judgment should be affirmed.

DAVIES, J. The defendants, as common carriers, received at Albany, on the 5th of February, 1857, three boxes of dry goods, in good order, to be transported from Albany to Rochester, for a consideration, which was to be paid on delivery. Two of said boxes were forwarded immediately on their arrival at Albany by the Hudson River Railroad; and the other, not being accompanied by a bill of back charges from the Hudson River Railroad, was detained by the appellants at their warehouse in Albany. While so detained, the contents of said box were injured by being wet by a rise in the Hudson River, on the seventh, eighth, and ninth days of February, 1857. This box was afterwards shipped to, and on or about the seventeenth day of February, 1857, received by, the respondents, unaccompanied by a bill of back charges from the

Hudson River Railroad Company. Said goods, while so detained at Albany, were damaged by the said flood, to the extent of one hundred dollars. The jury, under the direction of the court, found a verdict for the plaintiffs, and judgment thereon was affirmed at the general term.

Two questions are presented for consideration in this case: 1. Whether the defendants are excusable for the detention of the box at Albany; if not, then was it negligence in them so to do? 2. The injury having happened to the goods by an act of God, are the defendants responsible for that injury under the circumstances presented in this case?

The law is well settled that common carriers, while engaged in the transportation of goods for hire, are not responsible for injuries to them caused by an act of God or the public enemy. With the exception of injuries thus caused, they are liable for all damage to goods intrusted to them, while under their care and control. For the reasons stated in the opinion in the case of *Read v. Spaulding*, 30 N. Y. 630 [post, p. 426], decided at this term, the carrier, to exempt himself, must show that he was free from fault at the time the injury or damage happened. He must show that he was without fault himself, and that no act or neglect of his concurred in or contributed to the injury. If he has departed from the line of duty, and has violated his contract, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God, which would not otherwise have produced the injury, then the carrier is not protected. In the present case, it is apparent that if the goods had not been detained at Albany until the happening of the flood, no injury to them would have occurred. The question then recurs, Was such detention justifiable? or was it negligence on the part of the defendants? They seek to justify it on the ground that by their regulations goods received from a connecting road were not forwarded until the receipt of a bill of back charges. When the goods in the present case were delivered to the defendants by the Hudson River Railroad Company, who in this respect acted as the agents of the plaintiffs, to be transported to Rochester, and the same was received by them for that purpose, it became the duty of the defendants immediately to send them off. If the Hudson River Railroad Company delivered no bill of back charges with the goods, nor gave any notice that any such existed, the defendants should have assumed that there were none, and they would have been justified in delivering the goods to the

plaintiffs, without any claim for such charges. Clearly the Hudson River Railroad Company could have had no claim upon the defendants for any bill for back charges. They discharged their lien upon the goods for such back charges, by the delivery of the same to the defendants, to be carried and delivered to the plaintiffs without any notice of claim for any such charges; and if any existed, they would have been remitted therefor to their claim against the plaintiffs personally.

I am unable to see any justification to the defendants for detaining the plaintiffs' goods because the Hudson River Railroad Company did not present a bill for back charges. Its omission to do so, or to give notice that such charges existed, should have been taken as evidence by the defendants that in fact there were no back charges. The ground assumed, that they were justified in detaining the goods until a bill of back charges was presented, cannot be maintained. The regulation of the defendants may be reasonable enough as between the two companies, but it cannot be permitted to affect the rights of third parties, ignorant of its existence, and who cannot be presumed to have contracted with reference to it. If the defendants were not excusable for the detention of the box of goods in Albany, to await the rendering of a bill for back charges by the Hudson River Railroad Company, then such detention was negligence on their part. Such negligence having concurred in and contributed to the injury to the plaintiffs' goods, they are precluded from claiming the exemption from liability which the law would otherwise extend to them. The court, on the trial, properly, therefore, refused to give the instructions asked for by the defendants' counsel, and the instructions and charge to the jury were such as, under the facts proven, it was the duty of the court to give. The judgment appealed from should be affirmed, with costs.

DENIO, C. J., was for affirmance on the ground stated by DAVIES, J., and lastly stated by WRIGHT, J., as to what is an act of God.

All the other judges concurred with the chief judge, except SELDEN and INGRAHAM, JJ., who did not sit in the case.

Judgment affirmed.

AOT OF GOD, WHAT IS: See *New Brunswick Steamboat etc. Co. v. Tiers*, 64 Am. Dec. 394, and the cases in the note thereto; *Fergusson v. Brent*, 71 Id. 502.

COMMON CARRIER IS RESPONSIBLE FOR LOSS OF OR INJURY TO GOODS intrusted to him for transportation, unless occasioned by act of God or public enemies: *Welsh v. Pittsburgh etc. R. R.*, 75 Am. Dec. 490, and note citing prior cases; *Bennett v. Byram*, 75 Id. 90; *Powell v. Pennsylvania R. R.*, 75 Id. 564; *Cranwell v. Ship Foodick*, 77 Id. 190; *Arnold v. Jones*, 82 Id. 617; *Reaul v. Spaulding, infra*; and see *Hayes v. Wells*, 83 Id. 89.

COMMON CARRIER, WHETHER LIABLE WHERE HIS NEGLIGENCE EXPOSES GOODS TO LOSS OR INJURY, notwithstanding such loss or injury occurred through act of God or the public enemies, or the loss or injury was one for which he was exempted from liability by contract: See *Morrison v. Davis*, 57 Am. Dec. 695, and note; *New Brunswick Steamboat etc. Co. v. Tiers*, 64 Id. 394; *Denny v. New York Central R. R.*, 74 Id. 645; *Read v. Spaulding, infra*. The principal case is cited to the affirmative of this question in *Bostwick v. Baltimore etc. R. R.*, 45 N. Y. 717; *Condict v. Grand Trunk R'y*, 54 Id. 505; *Ransom v. Holland*, 59 Id. 619; *Dana v. New York Central etc. R. R.*, 50 How. Pr. 431; *Monell v. Northern Central R. R.*, 67 Barb. 537; *Caldwell v. Southern Express Co.*, 1 Flipp. 87.

COMMON CARRIER MUST TRANSPORT GOODS WITHOUT DELAY: *Ohio etc. R. R. v. Dunbar*, 71 Am. Dec. 291, and the note thereto; *Denny v. New York Central R. R.*, 74 Id. 645; *Blackstock v. New York etc. R. R.*, 75 Id. 372; *Read v. Spaulding, infra*. The principal case was distinguished in *Stedman v. Western Transportation Co.*, 48 Barb. 100, in holding that a delay in the transportation of goods was not unreasonable, but in accordance with the usual course of business.

THE PRINCIPAL CASE IS ALSO CITED in *Root v. Great Western R. R.*, 45 N. Y. 534, and *Lamb v. Camden etc. Transportation Co.*, 2 Daly, 494, to the point that a connecting carrier who takes the goods into his custody becomes responsible for them immediately upon their receipt; and without the delivery of the way-bill, notwithstanding the usage between the carriers to deliver it: *Root v. Great Western R. R., supra*.

READ v. SPAULDING.

[20 NEW YORK, 630.]

COMMON CARRIER IS RESPONSIBLE FOR LOSS OF OR INJURY TO GOODS intrusted to him for transportation, unless the loss or injury happen in consequence of the act of God or the public enemy.

COMMON CARRIER IS RESPONSIBLE FOR INJURY TO GOODS BY ACT OF GOD, if he departs from his line of duty, and while thus in fault, and in consequence of the fault, the goods are injured by an act of God, which would not otherwise have caused the injury.

COMMON CARRIER IS RESPONSIBLE FOR INJURY TO GOODS BY ACT OF GOD, where the goods were exposed to the injury by the carrier's unreasonable delay in forwarding them.

ACTION against the defendant, as the proprietor of an express line, to recover damages for an injury to five cases of straw goods, which the defendant had agreed to transport from New York City to Louisville, Kentucky. The goods formed part

of eighty-four cases, which were delivered to the defendant at New York, January 27, 1857. Seventy-nine of the cases arrived at Louisville in twelve or fourteen days after delivery at New York, the average time of transportation between the two places being about fifteen days. The five damaged cases reached Albany February 7, 1857, where they were stored in a warehouse of the New York Central Railroad Company, and were injured on the night of the 8th and the morning of the 9th, following, by an unprecedented flood. The defendant moved for a nonsuit, on the ground that the damage to the goods was caused by an act of God, and therefore the defendant was not liable. The court denied the motion, and directed a verdict for the plaintiffs for the full amount of the injury to the goods, with interest. The defendant's exceptions to the rulings of the court having been directed to be heard, in the first instance, at a general term of the supreme court, the general term ordered judgment for the plaintiffs. The defendant thereupon appealed to this court.

S. T. Fairchild, for the appellant.

G. M. Speir, for the respondents.

By Court, DAVIES, J. It is conceded that there was unreasonable delay on the part of the defendant in the carriage of the goods from the city of New York to the city of Albany. The eighty-four cases were delivered together on the 27th of January, and it was the duty of the defendant to transport or forward the same without unnecessary delay. If they had all been forwarded together, the whole would have reached Louisville about the time that those five cases reached the city of Albany. Then it is also conceded that the goods were injured by an act of God, which ordinarily would excuse the carrier. The law, upon well-known motives of policy, has determined that a carrier shall be responsible for the loss or injury to property intrusted to him for transportation, though no actual negligence exist, unless it—the loss or injury—happen in consequence of the act of God or the public enemy: *Wibert v. New York and Erie R. R. Co.*, 12 N. Y. 245. The defendant seeks to avail himself of this well-recognized rule of law to relieve himself from liability in the present action; and there would be no question that it would be adequate for such purpose if the defendant had been free from fault himself, and if his negligence had not contributed to the injury complained of. It is a well-settled rule that, when the law creates a duty

or charge, and the party is disabled from performing it, without any default in himself, and has no remedy over, the law will excuse him: *Harmony v. Bingham*, 12 Id. 99 [62 Am. Dec. 142]. It is to be observed that the foundation of this exemption is, that the party claiming the benefit and application of it must be without fault on his part. If these goods, therefore, had been forwarded from New York to Albany with reasonable diligence, and the injury had happened to them, as it did, by an act of God, then the defendant would have been excused and exempted from liability for the damages to the goods so intrusted to him. This principle or distinction is fully recognized by abundant authority, and is founded alike upon sound sense and good morals. In *Davis v. Garrett*, 6 Bing. 716, the plaintiff put on board the defendant's barge lime, to be conveyed from the Medway to London. The master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime, and the barge taking fire thereby, the whole was lost. The defendant claimed that, the lime having been destroyed by the act of God, he was exempt from all liability for its loss. But the court thought otherwise; and Tindal, C. J., in delivering the opinion, observed that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss had actually happened whilst his wrongful act was in operation and force, and which was attributable to his wrongful act, he could not set up, as an answer to the action, the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show not only that the same loss might have happened, but that it must have happened if the act complained of had not been done. There is no evidence of this character in the present case, nor any suggestion that the injury in the present instance would have occurred if the goods had been sent forward without any unreasonable delay. It is apparent that if they had been they would not have been injured in the particular manner they were. If the five cases injured had gone on with the other seventy-nine cases,—and no reason is suggested why they could not,—it is reasonable to assume they would have reached their ultimate destination without injury.

In the case of *Columbia and Charleston Steamboat Co. v. Bason*, 1 Harp. 262, where goods were laden on board a steamboat which grounded from the reflux of the tide, in consequence of which she fell over, and the bilge-water rose into

the cabin and injured a box of books belonging to the plaintiff, the defendants were held liable for the loss. The court regarded the defendants as guilty of negligence, in not selecting a proper place for the grounding of the vessel, and in not removing the books when the water came into the cabin, and said that the injury was not an unavoidable consequence of the grounding, but the consequence of negligence in grounding. So, also, in *Campbell v. Morse*, 1 Id. 468, the wagon of the defendant, in which he was carrying goods for hire, stuck fast in fording a creek, and the water rising suddenly damaged the goods, it was held that the defendant was liable for the damages so occasioned. The court say that it is manifest that if the defendant had gone through the creek without stopping, no injury would have resulted; his halting there, and not the rise in the creek, was the cause of injury, and if such circumstance were to operate as a relief from liability, the carriers of this description would be always exempted. In *Bell v. Reed*, 4 Binn. 127 [5 Am. Dec. 398], the supreme court of Pennsylvania held that a carrier's vessel must be seaworthy, or he must answer for the loss or injury to goods carried in her, although the loss does not proceed from the unseaworthiness. *Hart v. Allen*, 2 Watts, 114, contains a very critical review of *Bell v. Reed*, *supra*, and Gibson, C. J., says that it was held in that case that to render a carrier liable for an act of Providence it is necessary that his own carelessness should have co-operated with it to precipitate the event. And in this latter case it was held that the first inquiry was to test the liability of the carrier whether the captain and crew of the vessel carrying the goods had competent skill and ability to navigate the vessel; and if they had not, whether the want of it contributed in any degree to the actual disaster. In *Hand v. Baynes*, 4 Whart. 204 [33 Am. Dec. 54], the carrier was held liable for loss of goods caused by an act of God, on the ground that he had deviated from the direct and usual route, and was therefore in fault at the time the injury happened.

In *Williams v. Grant*, 1 Conn. 487 [7 Am. Dec. 235], Swift, C. J., thus clearly defines the rule of law applicable to a case of this kind. He says: "Under the term 'act of God' are comprehended all misfortunes and accidents arising from inevitable necessity, which human prudence could not foresee or prevent; and in cases of this description carriers may be liable for a loss arising from an inevitable necessity existing at the time of the loss, if they had been guilty of a previous

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negligence or misconduct by which the loss may have been occasioned." Gould, J., said: "It is a condition precedent to the exoneration of the carriers, that they should have been in no default; or in other words, that the goods of the bailee should not have been exposed to the peril or accident which occasioned the loss by their own misconduct, neglect, or ignorance. For though the immediate or proximate cause of a loss in any given instance may have been what is termed the act of God or inevitable accident, yet if the carrier unnecessarily exposes the property to such accident by any culpable act or omission of his own he is not excused." *Crosby v. Fitch*, 12 Conn. 410 [31 Am. Dec. 745], holds the same doctrine. These cases therefore clearly establish the rule that the carrier cannot avail himself of the exception to his liability which the law has created unless he had been free from negligence or fault himself. The policy of the law is to hold carriers to a strict liability; and this policy for wise and just purposes ought not to be departed from. But when the injury occurs from a cause which the carrier could not guard against nor protect himself from, in such an event the law excuses him, but it only does it when he himself is not in fault and is free from all negligence.

There are two cases which seem to maintain a contrary doctrine, and which will now be adverted to. One is that of *Morrison v. Davis*, 20 Pa. St. 171 [57 Am. Dec. 695]. In that case goods were carried in a canal-boat on the Pennsylvania Canal, and were injured by the wrecking of the boat, caused by an extraordinary flood, and it was held that the carriers were not rendered liable merely by the fact that when the boat was started on its voyage one of the horses attached to it was lame, and that in consequence thereof such delay occurred as prevented the boat from passing the place where the accident happened, beyond which place it would have been safe, and the general proposition was decided that carriers are answerable for the ordinary and proximate consequences of their negligence, and not for those which are remote and extraordinary. The court in its opinion assumed that the immediate cause had the character of an inevitable accident, but that this cause could not have affected the boat had it not been for the remote fault of starting with a lame horse. And the general rule was declared to be that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may on this account be fore-

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seen by ordinary forecast, and not for those which arise from a conjunction of the faults with other circumstances that are of an extraordinary nature, and it was held that the true measure of liability was indicated by the maxim, *Causa proxima, non remota spectatur*.

The other case is that of *Denny v. New York Cent. R. R. Co.*, 13 Gray, 481 [74 Am. Dec. 645], where it was held that the proprietors of a railroad, who negligently delayed the transportation of goods delivered to them as common carriers, and then to transport them safely to their destination, are not responsible for injuries to the goods by a flood while in their depot at that place, although the goods would not have been exposed to such injury but for the delay. The jury found specially that the defendants were wanting in that degree of care and diligence which the law required of them in seasonably transporting the plaintiff's wool from the Suspension Bridge to Albany, and that the wool was injured by reason of the want of such care and diligence, and that the defendants were wanting in that degree of care which the law required of them in attempting to save the plaintiff's wool from the injury which it received at the place where it was deposited by them on its arrival at Albany. In the opinion of the court the case was considered only upon the first finding, the verdict of the jury upon the second having been set aside as against the weight of evidence. And the court held the jury only to affirm that the defendants failed to exercise due care and diligence in the prompt and seasonable transportation of the wool, and that by reason of this failure, and the consequent detention of the wool at Syracuse, it was injured by the rise of the water in the Hudson, and thereby sustained damages to which it would not have been exposed if it had arrived at Albany as soon as it should have done, because in that event it would have been taken away from the defendants' freight depot and carried forward to Boston before the occurrence of the flood. The decision was put in the case upon the ground that the defendants were responsible only for the proximate and not for the remote consequences of their actions. And the court, arriving at the conclusion that the defendants were not liable, placed much stress upon the fact that the duty of the defendants, as carriers, had terminated at the time the injury happened. They had made the delivery required of them, and they were sought to be charged because they had not made it earlier. At the time of the flood,

therefore, they were not in charge of the wool as common carriers. All their duties and responsibilities as such had ceased, except that they were liable for such damages as the owners had sustained by reason of their delay in the delivery of it. The court say that the rise in the waters of the Hudson, which did the mischief to the wool, occurred at a period subsequent to this,—that is, the termination of their duty as carriers,—and consequently was the direct and proximate cause to which the mischief is to be attributed. The negligence of the defendants was remote; it had ceased to operate as an active, efficient, and prevailing cause as soon as the wool had been carried on beyond Syracuse, and could not, therefore, subject them to responsibility for an injury to the plaintiff's property resulting from a subsequent inevitable accident which was the proximate cause by which it was produced.

In the case at bar the property was yet in the custody, care, and control of the carrier. His duty in relation to it had been only in part performed, and although the injury would not doubtless have happened but for the negligence of the defendant, yet it can hardly be said that such negligence was so remote that it did not contribute to the injury. A similar objection was urged in the case of *Davis v. Garrett*, 6 Bing. 716, where it was urged that there was no natural or necessary connection between the wrong of the master in taking the barge out of its proper course and the loss itself, for that the same loss might have been occasioned by the very same tempest if the barge had proceeded in her direct course. But the court held the objection untenable, and said the same answer might be attempted to an action against a defendant who had by mistake forwarded a parcel by the wrong conveyance, and a loss had thereby ensued, and yet the defendant in that case would undoubtedly be liable. These cases in Pennsylvania and Massachusetts would seem to establish the exemption of the defendant from liability in the present action. If they are to be regarded as holding that doctrine, they are certainly in conflict with numerous adjudged cases, and would greatly relax the rules as to the responsibility of common carriers; and in this state, where with one exception these rules have been rigidly adhered to, they ought not to be followed. When the carrier is intrusted with goods, and they are injured or lost on the transit, the law holds him responsible for the injury. He is only exempted by showing that the injury was caused by an act of God or of the public enemy. And to avail himself

of such exemption, he must show that he was free from fault at the time. In the language of the superior court, "a common carrier, in order to claim exemption from liability for damage done to goods in his hands in course of transportation, though injured by what is deemed the act of God, must be without fault himself; his act or neglect must not concur and contribute to the injury. If he departs from the line of duty, and violates his contract, and while thus in fault, and in consequence of the fault, the goods are injured by the act of God, which would not otherwise have caused the injury, he is not protected." For these reasons, I am of the opinion that the judgment of the superior court should be affirmed.

JOHNSON, J., was for reversal.

All the other judges being for affirmance, judgment affirmed.

COMMON CARRIER IS RESPONSIBLE FOR LOSS OF OR INJURY TO GOODS intrusted to him for transportation, unless occasioned by act of God or public enemies: *Michaels v. New York Central R. R.*, ante, p. 415, and note. The principal case is cited in *Simmons v. Law*, 4 Abb. App. 245, S. C., 3 Keyes, 220, to the point that a common carrier's general liability exists, and if a loss arises from any cause, excepted either by the rules of the law or the qualifications of contract, he is so far relieved from his liability, but no further

COMMON CARRIER IS LIABLE FOR INJURY TO OR LOSS OF GOODS, notwithstanding he would otherwise be exempted by the law or his contract from liability, if his negligence exposed the goods to the injury or loss: *Michaels v. New York Central R. R.*, ante, p. 415, and note; *Lamb v. Camden etc. Transportation Co.*, 46 N. Y. 288; *Condict v. Grand Trunk R'y*, 54 Id. 505; *Rawson v. Holland*, 59 Id. 619; *Dunson v. New York Central R. R.*, 3 Lans. 269; *Lamb v. Camden etc. Transportation Co.*, 2 Daly, 471; *Heyl v. Inman Steamship Co.*, 14 Hun, 568; and see *Whitworth v. Erie R'y*, 87 N. Y. 419; *Beach v. Raritan etc. Co.*, 37 Id. 468, all citing the principal case.

COMMON CARRIER MUST TRANSPORT GOODS WITHOUT DELAY: See *Michaels v. New York Central R. R.*, ante, p. 415, and note.

CASES AT LAW
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

STATE v. JOHNSON.

[1 WINSTON'S LAW, 222.]

EVIDENCE THAT STOLEN PROPERTY WAS FOUND in the possession and house of the accused, where he and his wife alone resided, is competent as tending to establish his guilt.

POSSESSION OF STOLEN PROPERTY, although not so recent as to raise a legal presumption of the taking, is nevertheless evidence to be considered in connection with other evidence upon that point.

THE opinion states the facts.

Winston, Sen., for the state.

Defendant was not represented by counsel.

By Court, **MANLY, J.** We are informed that the proofs in this cause establish as a fact the finding of the stolen property in the house of the defendant, where he and his wife alone resided; and the exception to the charge of the judge is, that he regarded this as a possession by the defendant, and authorized the jury so to assume.

We do not think this is erroneous. The sense of the term "possession" in this connection is not necessarily limited to custody about the person. It may be of things elsewhere deposited but under the control of a party. It may be in a storeroom or barn when the party has the key. In short, it may be in any place where it is manifest it must have been put by the act of the party or his undoubted concurrence: See *State v. Williams*, 2 Jones, 194; and cases referred to in *Waterman's Notes to 2 Archbold's Criminal Practice and Pleading*, 869.

We think the case before us falls within the scope of the decided cases, and that it is proper to hold one responsible as the possessor of property when it is found in his dwelling-house under the circumstances stated in this case. It consists with reason, policy, and the just rights of persons to hold as a legal presumption that the property must have been put there by his act or by his concurrence.

This disposes of the only exception which appears upon the record, and there is nothing in other portions of the judge's charge of which the defendant can properly complain. It is clearly in accordance with well-settled principles of evidence. Possession of stolen property, although not so recent as to raise a legal presumption of the taking, is nevertheless evidence to be considered in connection with other evidence upon that point. It is of very frequent occurrence on the circuits that a part of the evidence in cases of larceny consists of proof that the stolen property was found in the house of the accused, either before or after his apprehension, and question has rarely been made in our courts, so far as I am aware, of its competency. At any rate, it is now settled to be admissible, be the time longer or shorter, and however insufficient it may be *per se* after a considerable lapse of time. Such a possession, of course, is more or less cogent according to the lapse of time. The nature of the house and the condition of the household, the manner of keeping the lost property, proximity to the place of taking, the probability or improbability of representations to account for the possession, the character of the deceased, and the like. Such matters of proof might give significance to a possession which would be of itself of slight import; and all such evidence is therefore competent, and may be sufficient to satisfy a jury of the felonious taking by the person who is fixed with the possession. There was evidence of this character in the cause. It appears to have been fairly laid before the jury, according to the view here taken; and the jury have come to a conclusion with which we have no right to interfere, if we had the inclination.

Let this opinion be certified to the superior court of New Hanover, to the end that the court may proceed to judgment according to law.

EVIDENCE THAT STOLEN PROPERTY WAS FOUND upon defendant is admissible in prosecutions for larceny: *Engleman v. State*, 52 Am. Dec. 494, and note 499.

POSSESSION OF PROPERTY AS EVIDENCE OF THEFT: See *Garcia v. State*, 82 Am. Dec. 605, and note 607; note to *Hunt v. Commonwealth*, 70 Id. 447-452. Possession of goods when search is instituted two weeks after the theft is committed raises more than a slight presumption of guilt, and the jury should be so instructed: *State v. Riggs*, 82 N. C. 678, citing the principal case. Where stolen cotton is found in the dwelling-house of defendant, occupied exclusively by himself and wife, it is evidence tending to establish his guilt, but the evidence is slighter if the property is found in defendant's barn, not so immediately in his occupation: *State v. Brown*, 76 Id. 226, citing the principal case.

STATE v. BLACK.

[1 WINSTON'S LAW, 266.]

HUSBAND HAS RIGHT TO COERCE WIFE, is required to govern his household, and for that purpose may use toward his wife such degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury is inflicted, or there is an excess of violence, or such degree of cruelty inflicted as shows a desire by the husband to gratify his own bad passions, the law will not invade the domestic forum, nor inflict punishment upon him.

INDICTMENT for assault and battery. The opinion states the facts.

Winston, Sen., for the state.

Defendant was not represented by counsel.

By Court, PEARSON, C. J. A husband is responsible for the acts of his wife, and he is required to govern his household, and for that purpose the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum or go behind the curtain. It prefers to leave the parties to themselves, as the best mode of inducing them to make the matter up and live together as man and wife should.

Certainly the exposure of a scene like that set out in this case can do no good. In respect to the parties, a public exhibition in the court-house of such quarrels and fights between man and wife widens the breach, makes a reconciliation almost impossible, and encourages insubordination; and in respect to the public, it has a pernicious tendency; so, *pro bono publico*, such matters are excluded from the courts, un-

less there is a permanent injury or excessive violence or cruelty indicating malignity and vindictiveness.

In this case, the wife commenced the quarrel. The husband, in a passion provoked by excessive abuse, pulled her upon the floor by the hair, but restrained himself, did not strike a blow, and she admits he did not choke her, and she continued to abuse him after she got up. Upon this state of facts the jury ought to have been charged in favor of the defendant: *State v. Pendergrass*, 2 Dev. & B. 365 [31 Am. Dec. 416]; *Joyner v. Joyner*, 6 Jones Eq. 325.

It was insisted by Mr. Winston that, admitting such to be the law when the husband and wife lived together, it did not apply when, as in this case, they were living apart. That may be so when there is a divorce from bed and board, because the law then recognizes and allows the separation, but it can take no notice of a private agreement to live separate. The husband is still responsible for her acts, and the marriage relation and its incidents remain unaffected.

This decision must be certified to the superior court of law for Ashe County, that it may proceed according to law.

RIGHT OF HUSBAND TO USE FORCE TO RESTRAIN OR CONTROL WIFE. — It is difficult to ascertain or to state with any degree of exactness what power the husband had in the early history of the law to use force in chastising, correcting, or restraining the person of the wife. Blackstone says that "the husband, by the old law, might give the wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisements, in the same moderation that a man is allowed to correct his apprentices or children. . . . But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife." He then states that by the civil law the husband was given greater authority over the wife, and continues, that the lower rank of people still claim and exert the old privilege, and in closing says that "the courts of law will still permit a husband to restrain a wife of her liberty in case of any gross misbehavior": 1 Bla. Com. 445; see also Reeve's Dom. Rel. 65. The rule would seem to have been greatly modified in England, if it is not entirely obsolete there, for in a late case it is held that, though a husband may, if he cannot otherwise restrain his wife, use some violence to restrain her, if she gets drunk, loses her self-control, uses personal violence towards him, or destroys his property, or if she comes into his shop in a drunken condition, he may gently remove her, but to follow and beat her is unexcusable; "there is no law authorizing a man to beat his drunken wife": *Pearman v. Pearman*, 1 Swab. & T. 601; see *Pritchard v. Pritchard*, 3 Id. 523. The right has been recognized in this country, though it has generally met with disapproval, and is now entirely overthrown. Kent says that the law makes the husband the guardian of the wife, and gives him a reasonable control over her, and allows him to put "gentle restraints upon her liberty, if her

conduct is such as to require it": 2 Kent's Com. 181. The power of the husband to chastise the wife was first called into question in this country, so far as we are able to find, in 1824, in the case of *Bradley v. State*, Walk. (Miss.) 156, where the lower court held that the husband could not be convicted of an assault upon the wife, and on appeal the court recognized the old rule, that the husband might use a whip or rattan no larger than his thumb, upon his wife for the purpose of enforcing the salutary restraints of domestic discipline, and says that the rule might be narrowed down in such manner so "as to restrain the exercise of the right within the compass of great moderation without producing a destruction of the principle itself"; and it is then said that to screen from public reproach those who may be engaged in "family broils and dissensions, let the husband be permitted to exercise the right of moderate chastisement in cases of emergency, and use salutary restraints in every case of misbehavior, without being subjected to vexatious prosecutions, resulting in mutual discredit and shame to all parties concerned." This right of reasonable chastisement by the husband for the purpose of government of the wife is recognized in *Adams v. Adams*, 100 Mass. 370; S. C., 1 Am. Rep. 111; see also *Commonwealth v. Wood*, 97 Mass. 229. So the husband may restrain the wife of her liberty in case of gross misbehavior: *People v. Mercein*, 38 Am. Dec. 644. And it has been held in Pennsylvania that the husband has a reasonable control over the actions of the wife; he may lay hands upon her even rudely if necessary to prevent the commission of some unlawful or criminal act: *Richards v. Richards*, 1 Grant Cas. 392.

The court of North Carolina long adhered to the rule laid down in the principal case, maintaining that the husband might exercise sufficient forcible control over the wife, as they expressed it, to make her behave herself, and that he would not be punished so long as he did not inflict permanent injury, and there was no excess of violence shown, nor such degree of cruelty as to indicate that it was inflicted to gratify his own bad passions: *Joyner v. Joyner*, 6 Jones Eq. 325; *State v. Rhodes*, Phill. (N. C.) 455; *State v. Mabrey*, 64 N. C. 593. But the rule was at last overthrown, and in the case of *State v. Oliver*, 70 Id. 61, Settle, J., says: "We may assume that the old doctrine that a husband had a right to whip his wife, provided he used a switch no larger than his thumb, is not law in North Carolina. Indeed, the courts have advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife under any circumstances." In accord with this view is *Taylor v. Taylor*, 76 Id. 433. As Schouler well says: "The rule of persuasion has superseded the rule of force. . . . The right to inflict corporal punishment upon the wife has never been favored in this country, and its exercise would now generally justify proceedings for divorce": Schouler's Dom. Rel. 44; Schouler's Husband and Wife, 68; see 1 Bishop on Marriage and Divorce, 754. In *Fulgham v. State*, 46 Ala. 143, the old rule was expressly repudiated, and the court held that the husband had no right to use any instrument to administer to the wife even moderate correction, to enforce his just commands. So the husband has no right to beat his wife, or to inflict punishment upon her: *People v. Winters*, 2 Park. Cr. 10; see *James v. Commonwealth*, 12 Serg. & R. 220-226; *Owen v. State*, 7 Tex. App. 337; *Gholston v. Gholston*, 31 Ga. 635; *Pillar v. Pillar*, 22 Wis. 659; except in self-defense: *Gorman v. State*, 42 Tex. 221. Beating or striking the wife violently with the open hand is not a right conferred on the husband by the marriage, even if the wife is drunk or insolent: *Commonwealth v. McAfee*, 108 Mass. 458; S. C., 11 Am. Rep. 383. He cannot strike her with his fist when she is pregnant: *State v. Buckley*, 2 Harr. (Del.) 552. Nor can he

lawfully beat her, even if she is an adulteress: *Shackett v. Shackett*, 49 Vt. 197. A man cannot justify, under hardly any circumstances, the infliction of bodily chastisement upon a woman; much less can he be tolerated or justified in striking his wife with a cowhide: *Bascom v. Bascom*, Wright, 632-634. Whatever may have been the common law upon the subject, "the moral sense of the community, in our present state of civilization, will not permit the husband to inflict personal chastisement upon the wife, even for the grossest outrage": *Perry v. Perry*, 2 Paige, 503. An advanced and humane civilization has long since freed the wife from the slavery of the husband, and has destroyed his despotic power over her. No provocation will justify him in cruel and inhuman treatment of his wife: *Knight v. Knight*, 31 Iowa, 459, quoting the language given from *Perry v. Perry*, *supra*. As is very truly said by Richardson, C. J.: "Whatever the old books may say upon the subject, there never was, in my opinion, in the relation between husband and wife, when rightly understood, anything which gave to a husband the right to reduce a refractory wife to obedience by blows. And at this day the moral sense of the community revolts at the idea that a husband may inflict personal chastisement upon his wife, even for the most outrageous conduct": *Poor v. Poor*, 8 N. H. 312; S. C., 29 Am. Dec. 644.

STATE v. DICK.

[2 WINSTON'S LAW, 45.]

ANY EXPRESSION OF OPINION BY TRIAL JUDGE as to whether a fact in issue is or is not sufficiently proved is error, which error is not cured by announcing in his charge the jury's independency of him in all matters of fact pertaining to the issue.

ADMISSIBILITY OF EVIDENCE IS QUESTION FOR COURT TO DETERMINE. It is error to leave the jury to decide the question of admissibility, and to instruct them to consider the evidence or not, as they find the one way or the other.

INDICTMENT for arson. The opinion contains the facts.

Attorney-general, for the state.

Defendant was not represented by counsel.

By Court, MANLY, J. In looking into the record in this case, two errors appear to have been committed on the trial, for one of which, at any rate, the prisoner is entitled to a *venire de novo*.

On the trial, a question arose as to the withdrawal of certain confessions of the prisoner. The court declined withdrawing them, but remarked to the solicitor for the state, that after the other evidence already given in the cause, he, the solicitor, might withdraw them if he chose to do so, which the solicitor declined. This seems to us to be an expression of opinion on the part of the judge that the case was sufficiently

proved without the aid of the confessions. This is not directly asserted, but is a matter of inference plainly from the manner in which the expedient of withdrawing the testimony is suggested. "After the other evidence already given in the cause, the solicitor might withdraw," etc. The sense which we attribute to this language is that which his honor himself seems to have ascribed to it; for he takes pain to explain to the jury that they were not bound by any opinion or judgment of his as to the facts. He endeavored to obviate the effect of his opinion by announcing, in distinct terms, the jury's independency of him in all matters of fact pertaining to the issue; but this it was not practicable for him to do. The opinion had been expressed, and was incapable of being recalled.

The statute declares that "no judge, in delivering a charge to the petit jury, shall give an opinion whether a fact is fully or sufficiently proved, such matters being the true office and province of a jury."

The object is, not to inform the jury of their province, but to guard them against any invasion of it.

The division of our courts of record into two departments, the one for the judging of the law, the other for judging of the facts, is a matter lying on the surface of our judicature, and is known to everybody. It was not information on this subject the legislature intended to furnish; but their purpose was to lay down an inflexible rule of practice,—that the judge of the law should not undertake to decide the facts. If he cannot do so directly, he cannot indirectly; if not explicitly, he cannot by innuendo. What we take to be the inadvertence of the judge, therefore, was not cured of its illicit character by the information which he immediately conveyed. Knowledge on the part of the jury of their proper province is not the criterion for determining the propriety or impropriety of an opinion from the judge as to the sufficiency of the proofs. It is the same whether the jury know their rights or not.

The provision of the law in question has been in existence since 1796. On the various occasions when the law has been digested and re-enacted, it has been continued in the same words, and the interpretation which we now give it is that which has been given it from the beginning. The judge cannot properly express an opinion whether a fact pertinent to the issue is sufficiently or insufficiently proved. Many questions of fact, especially inquiries into mental capacity and frauds, require as much experience, science, and acumen, as

the abstruser questions of law; and yet their decision is left by law in the hands of the comparatively inexperienced and unlearned. This, we suppose, has been to maintain undisturbed and inviolate that popular arbiter of rights, the trial by jury, which was, without some such provision, constantly in danger from the will of the judge acting upon men mostly passive in their natures, and disposed to shift off responsibility; and in danger, also, from the ever-active principle that power is always stealing from the many to the few. We impute no intentional wrong to the judge who tried this case below. The error is one of those casualties which may happen to the most circumspect in the progress of a trial on the circuit. When once committed, however, it was irrevocable, and the prisoner was entitled to have his case tried by another jury.

The second error appearing upon the record is the instruction given to the jury in relation to the confessions of the prisoner.

The question made before the court was, whether the confessions had not been made under such influences as to render them inadmissible. The two witnesses who had been examined before the judge upon that point were Kerr and Edson. The court instructed the jury that, as they had heard the evidence of these persons, if they believed Kerr had stated the truth of the transaction in regard to the confessions, then they were all to be received, and such credit given to them as they might think proper; but if they thought that Edson's statement was the true one, and the inducement was held out before the prisoner made any confession of his own guilt (if any such was made), then they should disregard all the evidence of confessions, etc. The error here consists in laying the confessions before the jury in this alternative way. In the first exception just considered, the judge went over into the field of labor belonging to the jury. In this, he invites the jury to come over into his. Neither is lawful. Such a trespass without leave on the part of juries, though a grave error, is irremediable in the class of cases now before us. If invited, it becomes an error in the judge. He cannot put upon others the decision of a matter, whether of law or fact, which he himself is bound to make. The parties are entitled to his judgment as a finality on all questions of fact arising on the trial of a cause upon which depends the admissibility of testimony. It is the duty of the judge to determine them definitively, and to admit or reject the testimony accordingly. It is error to leave

it to the jury to decide the preliminary question of admissibility, and to instruct them to consider it or not to consider it, as they find the question the one way or the other.

This matter was considered in the cases of *Ratliff v. Huntley*, 5 Ired. 545, and *Monroe v. Stutts*, 9 Id. 49, and the law declared to be as herein stated. For this error, the prisoner would be entitled to have his case put before another jury if it would by any possibility have brought him harm; but it does not appear to us that it could, the judge having previously decided against the prisoner; and it is not therefore considered of any avail to the prisoner in his bill of exceptions.

It is noticed in order to renew our disapprobation of the course.

For the first error the prisoner is entitled to a *venire de novo*.

This opinion is to be certified to the superior court, to the end that it may take further proceedings according to law.

CHARGE WHICH PRESENTS FACTS OR SUGGESTS CONCLUSION FROM FACTS, without informing the jury that they are the exclusive judges thereof, is erroneous, and is not cured by embodying in another charge the correct rule: *Horne v. State*, 81 Am. Dec. 499, and note 503.

COURT MUST DETERMINE LEGALITY OF EVIDENCE: *Beaman v. Russell*, 49 Am. Dec. 775, and note 782. Admissibility of evidence is a question for the court to determine, and the jury cannot be left to decide matters which the court is bound to determine: *State v. Andrea*, Phill. (N. C.) 206, citing the principal case.

ERRONEOUS INSTRUCTION IS NOT CURED by a subsequent correct one, given so late as not to show that the party's case has been prejudiced by the first: *State v. Caviness*, 78 N. C. 490, citing the principal case; see also *Horne v. State*, *supra*.

STATE v. ELLICK.

[2 WINSTON'S LAW, 56.]

KILLING IS MURDER, AND NOT MANSLAUGHTER, where parties fight by consent with deadly weapons, and the accused, having his weapon ready, takes his adversary at a disadvantage, and stabs him in the side while he is in the act of turning around to face the accused, and before he is on his defense.

KINDS OF MANSLAUGHTER STATED AND EXPLAINED.

IN MUTUAL COMBAT WITH DEADLY WEAPONS, an offer to strike does not amount to legal provocation.

ON TRIAL FOR MURDER, WHERE INTENTIONAL KILLING WITH DEADLY WEAPON IS ADMITTED, an instruction is proper which assumes as true what defendants' witnesses have sworn to, and states that such testimony does not mitigate the crime to manslaughter.

FACT OF HOMICIDE MUST BE PROVED BY STATE; but if found or admitted, the *onus* of showing justification, excuse, or mitigation is upon the accused, and the jury must be satisfied that the matter offered in mitigation is true.

THE opinion states the facts.

Attorney-general, for the state.

Eaton, for the defendant.

By Court, PEARSON, C. J. We concur with Mr. Eaton in the position that from the manner in which the case was put to the jury, the motion for a *venire de novo* is to be considered on testimony of the witnesses for the prisoner only; and that the testimony of his principal witness, Harriet, is to be taken in the view most favorable to him. This follows from the fact that the judge made a general charge, and did not "declare and explain the law arising on the evidence": *State v. Summey*, 2 Winst. 108, at this term; *Gaither v. Feribee*, 1 Id. 315; *State v. Norton*, 1 Id. 305.

We have these facts: The prisoner and one Micajah, in a starlight night, and in the shade of trees, had a fight. Micajah got the prisoner down, and then ran off. The prisoner rose up, and had his hand to his side, as if he was holding something in his hand; he then sat down on the door-sill, on which the deceased was sitting. Words passed between them; the prisoner got up; the deceased then rose up and reached his hand inside the door and got a stick. As he was turning round (after getting the stick), the prisoner stabbed him in the left side with a bowie-knife, the blade of which was nine inches long. The deceased then knocked him down with the stick; as he rose, he knocked him down a second and a third time; prisoner ran off, the deceased followed him a few steps, and fell, and died of the wound. The bowie-knife and stick were admitted to be deadly weapons.

The learned counsel insisted that the offense was manslaughter, on two grounds: 1. The act of seizing the stick, with an intent instantly to strike, was an assault with a deadly weapon, and amounted to legal provocation; 2. The prisoner had reasonable ground to believe that the deceased was about to do him great bodily harm, and struck to prevent it, which mitigates the offense to manslaughter.

Conceding these principles of law, the court is of opinion that neither applies to this case, and that the offense is murder. There is some confusion in respect to the application of these

principles of the law of homicide, growing out of *obiter dicta*, and certain decisions to be met with in the books. It is important that all confusion should be cleared away, especially in times like these; for one of the ill effects of war is to scatter deadly weapons among the people, familiarize the public mind to scenes of blood, and make a resort to such weapons a thing of frequent occurrence, unless it is prevented by the fear of the law. On this account, without attempting to review the cases (which would be an endless task), I will endeavor to give the reasons on which the law is based, whereby the proper applications of its principles will be made clear.

Manslaughter is of two kinds: 1. When the killing is the heat of blood; 2. When the killing is by accident or mistake, arising from negligence or a want of due precaution.

1. If A is about to strike B, who is unwilling to enter into a fight, and shows it by words or actions, or otherwise, as by going back, or warns A not to strike, and A presses on and strikes, or attempts to strike, and thereupon B kills with a deadly weapon, it is manslaughter; for there is a legal provocation, and the law ascribes the killing to "heat of blood," and not to malice.

2. If, on a sudden quarrel, the parties begin a fight by consent, without deadly weapons, and after blows pass, one uses a deadly weapon and kills, it is manslaughter; for by the excitement of the fight the blood is heated, and the killing is done, not of malice, but in the *furor brevis*, which the law, out of indulgence to human frailty, allows to mitigate the offense, although the party had himself committed a breach of the peace by entering into the fight willingly.

3. If, on a sudden quarrel, the parties fight by consent, at the instant, with deadly weapons, and one is killed, it is but manslaughter, provided the parties fight on equal terms and no undue advantage is taken; for the fairness of the fight rebuts the implication of malice, and the law mitigates the offense out of indulgence to the frailty of human nature.

Which of these three principles is applicable to our case? When it is proved that one has killed intentionally with a deadly weapon, the burden of showing justification, excuse, or mitigation is on him. It is admitted the prisoner killed intentionally, with a deadly weapon. He does not show by his words or actions that he declined the fight, or gave back, or warned the deceased not to strike; so the first principle does not apply. The parties did not begin the fight without

deadly weapons: so the second principle does not apply. The parties fought by consent, with deadly weapons: so the case falls under the third principle; and the question is narrowed to this: Does the principle in regard to a fair fight apply? or does the case fall under the exception in regard to a fight on unequal terms, and when undue advantage is taken? This is too plain for discussion. The prisoner, having his weapon ready, took his adversary at a disadvantage, and stabbed him in the side while he was in the act of turning round to face him, and before he was "on his defense." This dastardly act excludes the idea that he entered into the fight in compliance with the common notions of honor, and shows that he "sought the blood" of the deceased.

The principle by which a killing in a fair fight, with deadly weapons, is mitigated, was adopted at a time when every gentleman wore a sword; and the custom was, on offense given, to draw and fight. Such fights, owing to the expertness of the combatants in defense, were not often fatal. Manners have since changed. No one in private life now wears a sword, and how far this may affect the principle is a serious question; but it is certain that a fair fight at the instant, with deadly weapons, is now of rare occurrence. When one has a knife, and the other a stick or a pistol, they are not on equal terms; and the purpose of each is to take advantage and give a mortal blow as soon as possible. Such cases fall under the exception; the party killing is a murderer, and there is nothing to mitigate.

If, as contended by Mr. Eaton, in a "mutual combat" with deadly weapons, the offer to strike amounts to a legal provocation, neither party would ever be guilty of more than manslaughter; for each could say, My adversary was about to strike with a deadly weapon. So it would make no difference whether the fight was declined or entered into willingly, or was fair or unfair; and the law would encourage a hasty resort to deadly weapons, and an unfair use of them, by saying, You need not show that you declined the fight, and attempted to avoid it; you need not show that you took no undue advantage,—use your weapon as soon as you can, and take all advantages; for if your adversary is about to strike, it is a legal provocation, although you are also about to strike, and whichever kills will only be guilty of manslaughter. This would only lead to horrid consequences, and completely upset and confound all the principles which have been so carefully

adopted to deter men from the use of deadly weapons, and at the same time extend a reasonable indulgence to the frailty of human nature.

The learned counsel did not insist with much earnestness that the case could be brought under the second kind of manslaughter. One or two instances will show that the doctrine has no application. If one handles a loaded gun so negligently that it goes off and kills, it will be excusable homicide or manslaughter, according to the degree of negligence.

2. An officer pushed abruptly and violently into a gentleman's chamber early in the morning, to arrest him, not telling his business or using words of arrest. The gentleman, not knowing that he was an officer, under the first impulse stabbed him with his sword. It was ruled manslaughter at common law, for the prisoner, not knowing the officer's business, might, from his behavior, reasonably conclude that he was about to rob or murder him: *Cook's Case*, Cro. Car. 538.

3. Upon an outcry of thieves in the night-time, a person who was concealed in a closet, but no thief, in the hurry and surprise the family was under, was stabbed in the dark. This was holden to be an innocent mistake, and ruled *chance medly*: *Levet's Case*, cited in *Cook's Case*, *supra*. Foster, at page 299, observes of this case: "Possibly it might have been better ruled manslaughter, due circumspection not having been used." In all cases, when the offense is mitigated because the party acted under a mistake, for which there was reasonable ground, if the danger had been real, the act would have been justifiable. In our case the danger was real,—the deceased was about to strike with a deadly weapon; and if this doctrine applies, the killing was justifiable, and the prisoner ought to have been acquitted. *Reductio ad absurdum*.

The second objection to the charge is not tenable. From the view we have felt bound to take of the case, the judge is considered as having, in effect, instructed the jury that, putting the testimony of the witnesses on the part of the state out of the case, as an intentional killing with a deadly weapon was admitted, the testimony of the prisoner's witnesses did not mitigate the offense to manslaughter; and the prisoner has no reason to complain because the instruction assumes that what his own witnesses swore to was true.

The third objection is not tenable. The position "that the principle on which the doctrine of reasonable doubt is grounded is as much applicable to the grade of the homicide as it is to

the fact of the homicide," is not true. The error consists in not attending to the distinction that the fact of the homicide must be proved by the state; but if found or admitted, the *onus* of showing justification, excuse, or mitigation is upon the prisoner. At page 290, Foster says: "Whoever would shelter himself under the plea of provocation must prove his case to the satisfaction of the jury"; the presumption of law is against him "till the presumption is repelled by contrary evidence." At page 255 the matter is explained at large.

The principle on which the doctrine of reasonable doubt as to the fact of the homicide is grounded is that in favor of life; the fact which the state is required to establish must be proved beyond a reasonable doubt. It certainly would not be in favor of life to apply this doctrine to matter of mitigation, which the prisoner is required to establish. Hence, of regard to that the rule is, the jury must be satisfied by the testimony that the matter offered in mitigation is true.

There is error. This must be certified, etc.

ONE WHO ENTERS INTO MUTUAL COMBAT dangerously armed, and fighting with undue advantage, kills his adversary, is guilty of murder: *Price v. State*, 72 Am. Dec. 195; *State v. Scott*, 42 Id. 148. The principal case is cited to this point in *State v. Smith*, 77 N. C. 489.

ACCUSED IS PRESUMED INNOCENT until the prosecution establishes his guilt: *Horne v. State*, 81 Am. Dec. 499, and note. The burden of proof is on them: *Commonwealth v. McKie*, 61 Id. 410.

WHERE THERE IS NO CONFLICT OF TESTIMONY, its credit and sufficiency may be left to the jury without qualification: *State v. Vines*, 93 N. C. 498, citing the principal case.

WHERE INTENTIONAL KILLING WITH DEADLY WEAPON IS ADMITTED, the burden of showing excuse, mitigation, or justification is on the accused, and the jury must be satisfied that the matter offered is true: *State v. Carland*, 90 N. C. 675; *State v. Brittain*, 89 Id. 502; *State v. Payne*, 86 Id. 610; *State v. Willis*, 63 Id. 27, all citing the principal case. If prisoner made threats, provoked and brought on the fight, with intent to use a stick and kill his adversary, the crime is murder; but if the affray is sudden and mutual, and no undue advantage is taken, the killing is manslaughter: *State v. Mason*, 90 Id. 683, citing the principal case. Where one who is unwilling to fight is attacked by another, who intends to kill him, he may, if necessary, kill his assailant, and the killing will be merely manslaughter: *State v. Kennedy*, 91 Id. 577, citing the principal case.

CASES IN EQUITY
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

PATTON v. PATTON.

[WINSTON'S EQUITY, 20.]

WHERE LAND IS PURCHASED BY PARTNERSHIP, with partnership funds, and used for partnership purposes, upon the death of one of the partners his wife is entitled to dower in his share, in the absence of partnership articles to the contrary: See *Summey v. Patton*, post, p. 451.

DEVISE OF LAND OPERATES AS CONVEYANCE. Upon the death of the deviser the land passes directly to the devisee, and the executor takes no estate or interest in it.

LANDS DEVISED SPECIFICALLY TO WIFE AND CHILDREN do not come within the operation of a residuary clause in a will providing that certain tracts of land shall pass to the executor in trust to be sold, and the proceeds divided between the wife and children, and directing the executor "to keep my estate together, and not to hand over any of the devises or legacies" until the happening of a certain event. As to the land specifically devised, the words "not to hand over" have no application whatever.

BILL to recover dower. When taken in connection with *Summey v. Patton*, post, p. 451, the opinion sufficiently states the facts.

Merrimon, for the plaintiff.

Defendants were not represented by counsel.

By Court, PEARSON, C. J. The right of the plaintiff to dower in the tan-yard lot is settled by the case of *Summey v. Patton*, Winst. Eq. 52 [post, p. 451], at this term. The lot having been sold by the surviving partners, there will be a reference to fix the amount to which she is entitled absolutely, according to the ratable value of her life estate.

We are of opinion she is also entitled to dower in all of the land acquired by her husband under the will of J. W. Patton, except the tracts or parcels of land which pass to the executors under the residuary clause, in trust, to be sold by them, and the proceeds of sale divided equally among his wife and children. A devise operates as a conveyance. The land passes directly from the devisor to the devisee, and the executor takes no estate or interest in it. For this reason, the lands given specifically to the wife and children do not come within the operation of that clause which directs the executor "to keep my estate together, and not to hand over any of the devises or legacies until my existing railroad contracts in Tennessee and North Carolina are completed." In reference to land specifically given, the words "not to hand over" can have no application whatever. Indeed, apart from this principle, growing out of the essential difference between a devise and a legacy, we should incline to the opinion, that by a proper construction this restriction only applies to the property contained in the residuary clause. It is a part of that clause, and is naturally confined to the property therein disposed of; to say nothing of the unreasonableness of the supposition that it was the intention to tie up his whole estate, real and personal, until a future event, which might not happen for several years, leaving his wife and children in the mean time to starve. If such had been the intention, there surely would have been some provision for their support. And the fact that the land in the hands of the devisees would still remain ultimately liable for the debts of the devisor, in aid of the other portions of his estate towards the completion of the railroad contracts, seems to confirm the soundness of this construction.

Decree for the plaintiff.

DOWER, WHEN ALLOWED IN PARTNERSHIP LANDS belonging to a deceased partner: *Markham v. Merrett*, 40 Am. Dec. 76. When not allowed: *Andrew's Heirs v. Brown*, 56 Id. 252, and note 255; *Sumner v. Hampson*, 32 Id. 722, and note. The principal case is cited in *Ferguson v. Hass*, Phill. Eq. 115, to the point that the wife is entitled to dower in the realty of a deceased partner.

UPON DEATH OF ANCESTOR, HIS LANDS DESCEND DIRECTLY TO HIS HEIRS OR DEVISEES, free from any control by the executor or administrator: *Walbridge v. Day*, 83 Am. Dec. 227, and note; *Becket v. Selover*, 68 Id. 237, and note; *Carnall v. Wilson*, 76 Id. 351, and note. The principal case is cited in *Mendenhall v. Benbow*, 84 N. C. 650, to the point that in equity a partnership agreement devotes the partnership land to the payment of firm debts in case of insolvency, and postpones the individual creditors of the partners until the payment of the partnership debts.

GARROW v. BROWN.

[WINSTON'S EQUITY, 46.]

EQUITY WILL ANNUL CONTRACT FOR PURCHASE of land entered into by an imbecile, without counsel, by which he agrees to pay twice the true value of the land, and is otherwise imposed upon by the fraudulent representations of the vendor.

THE opinion contains the facts.

Merrimon, for the plaintiff.

By Court, **MANLY, J.** If the case stood alone upon the mental incapacity of Jesse Whitaker, deceased, we might feel constrained to send it to a jury to have an issue on that point tried.

It seems an inquisition was had in Buncombe, according to the usages of law, which resulted in a verdict that the subject was *non compos mentis*, which was reported to the county court at its April session, 1857. From this there was an appeal to the superior court of the county, and this appeal was pending at the time of his death.

The evidence which has been laid before us preponderates, we feel at liberty to say, in favor of the finding of the jury; but as the inquisition was not finally acted upon and settled by a jury upon testimony *viva voce*, it would be more in accordance with the caution with which this court proceeds in matters of so great importance to send it to the customary tribunal to have the fact established the one way or the other.

But we do not think the case necessarily turns upon this point. There are other well-settled principles of equity which dispose of it.

Whatever may be the degree of doubt left upon the precise mental condition of Jesse Whitaker about the time of the transactions in question,—if he could not at that time be properly classed amongst *non compotes mentis* technically,—it is nevertheless certain that he was very old, was prostrated by disease and intemperance, and his memory and will, at least, exceedingly uncertain and fluctuating.

He was advised by friends upon whose counsel he had theretofore relied, not to make the bargain without further information; and it was then understood and agreed, the defendant Brown being present, that no further action should be taken in the matter until the information needed was obtained.

After this arrangement the friends of Whitaker left the

house, and thereupon Brown, having remained, renewed the negotiation and effected the alleged sale of his land.

The further fact in this case is established to our satisfaction, that the price demanded and received for the land is twice its true value.

Here, then, are extreme imbecility of mind in the subject of the alleged fraud, an opportunity selected when he was "without counsel," in fraud of an agreement, secrecy in the transaction, and imposition in the price.

These are sufficient, we think, to call into action the interference and aid of this court.

This occasion or source of equity jurisdiction is fully explained in the cases of *Amis v. Satterfield*, 5 Ired. Eq. 173, and *Freeman v. Dwiggin*, 2 Jones Eq. 162.

The voluminous evidence which has been filed in this cause establishes with sufficient clearness the narrative we have given as the true state of the facts, according to the interpretation most favorable to the defendant, and the cases establish the principle that the court will annul a contract made under such circumstances, and remit the parties as far as it is practicable to do so to their previous positions. To this end a decree may be drawn perpetuating the injunctions heretofore granted, annulling the contract marked A in the papers, and directing a return of such notes, orders, or other securities as were given for the purchase-money.

EQUITY WILL RESCIND CONTRACT for the purchase of lands when the vendor has made misrepresentations: *Yost v. Shaffer*, 56 Am. Dec. 509; *Parham v. Randolph*, 35 Id. 403, and note 408; *Brown v. Manning*, 74 Id. 737, note 739; *Rimer v. Dugan*, 77 Id. 687, and note. That such contract may be set aside for gross inadequacy of price, see *Juzan v. Toulmin*, 44 Id. 448; *Briscoe v. Bronaugh*, 46 Id. 108, and notes to these cases.

SUMMEY v. PATTON.

[WINSTON'S EQUITY, 52.]

WHERE LAND IS PURCHASED BY PARTNERSHIP, with partnership funds, and used for partnership purposes, upon dissolution of the firm by the death of one of the partners, his share of the land descends to his heir at law as real estate, and does not pass to his representative as personalty, in the absence of any agreement in the articles of copartnership.

DOCTRINE OF ENGLISH EQUITY is that, as between partners and for the purposes of the firm, real estate belonging to the partnership will be treated as personalty if the partners have, by articles of copartnership or otherwise, impressed upon it that character.

THE opinion states the case.

Merrimon, for the plaintiff.

Defendants were not represented by counsel.

By Court, PEARSON, C. J. The pleadings present the question, whether land purchased by a firm with partnership funds for partnership purposes, and used as a part of the stock in carrying on the business, — a tannery for, instance, — in the absence of any agreement in the articles of copartnership, shall, on the dissolution of the firm by the death of one of the parties, descend as real estate to the heir at law, or pass as personal estate to the executor or administrator of the deceased partner.

For the purpose of deciding the general principle, we will put out of the case the special circumstance that the intestate, W. A. Patton, was the owner of the land, and after the formation of the firm conveyed three fourths of the lot to the other three members of the firm in fee-simple, retaining the other fourth, and that the articles of copartnership provide that at its dissolution all the debts shall be first paid out of the joint funds, the capital advanced be returned to each partner, and "the balance of the partnership assets shall then be equally divided between the four copartners."

It is the settled doctrine of equity in the English courts that, as between the partners and for the purposes of the firm, real estate belonging to the partnership will be treated as personalty if the partners have, by the articles of copartnership or otherwise, impressed upon it the character of personalty.

But it is a vexed question, whether, after the dissolution of the firm by the death of one of the members, the debts being all settled and no purpose of the firm requiring it, the share of the deceased partner in the land shall still retain its character of personal property and pass to his personal representatives, or shall descend as real estate to his heir at law.

Upon this point Mr. Justice Story, in his work on partnership, sec. 93, remarks: "There has been a great diversity of juridical opinion, as well as of judicial decision, and the doctrine may be considered as open to many distressing doubts."

The idea that land shall be considered and treated as personal property is not readily comprehended by a plain mind, and requires explanation. It is an artificial and refined doctrine, adopted by the chancellors in England in reference to copartnerships, on the principle of giving effect to the agree-

ment of the copartners, and originated in this wise: by the common law, on feudal reasons, land could not be sold for the payment of debts. By virtue of legislative enactments, the writ of *elegit*, and statutes merchants and staple, subjected land to the claims of creditors in a modified way; that is, by giving the creditor a right to have the land extended at a yearly value, and to have an estate and receive the rents and profits until, at the extended value, the debt was satisfied. This, however, did not cause land to answer the purposes of trade and become the means of extended credit as fully as if it could be sold out and out like personal property. Again, land held in joint tenancy was subject to the doctrine of survivorship, by which, on the death of either tenant, the whole estate belonged absolutely to the surviving tenant. This was a great drawback to the formation of copartnerships in which the business made it necessary for the firm to own land. To obviate these difficulties, the articles of copartnership in many instances contained an agreement that the land required and owned as part of the stock in trade should be considered and treated as personalty; and in others the acts of the parties furnished ground for the inference that it was the intention to impress on land the character of personalty in all such cases; and the courts inclined to extend them by construction and implication. It was held in equity that the agreement and intention of the parties should be carried into effect, and to do so the land must be considered and treated as personalty. This was all well enough and plain sailing as between the copartners and for the purposes of the firm, but when it was attempted to carry the principle further, and make it apply to land after a dissolution by the death of one of the parties, and after the business was closed, so as to disinherit the heir at law, and allow the personal representative to take the land and dispose of it as personal property, the doctrine became much more refined, and too attenuated for practical purposes, and calls for the remark of Mr. Justice Story, "that the doctrine may be considered open to many distressing doubts."

In this state land can be sold out and out under execution, and the doctrine of the common-law survivorship is abolished. So the two rules of law which gave rise to this doctrine, and were the foundation on which it was built, have been taken away; and we are inclined to the opinion, under the rule *cessante ratione, cessat lex*, the doctrine is not applicable to the relation of copartners, even between the parties them-

selves; and we are clearly of opinion that it does not apply as between the heir at law and the personal representative. And in the absence of any adjudication by which it is fixed in our law, we regard it as another of those refined doctrines of equity jurisprudence, which render the English system so extremely artificial and complicated, and add it to the list of "pin-money," "part performance," "the lien of a vendor for the purchase-money," "the duty of the purchaser to see to the application of the purchase-money," and the wife's equity for a settlement: *McKinnon v. McDonald*, 4 Jones Eq. 1 [72 Am. Dec. 574].

There will be a decree declaring that the plaintiff is not entitled to that part of the fund in the hands of the defendants arising from the sale of the tan-yard lot.

The cost to be paid by the plaintiff.

PARTNERSHIP REALTY, ON DEATH OF PARTNER, is not distributed as personalty, but descends to the heirs: *Yeatman v. Woods*, 27 Am. Dec. 452, and note 454. Such is the rule after the partnership debts are paid: *Buchan v. Sumner*, 47 Id. 305; *Andrews's Heirs v. Brown*, 56 Id. 252; *Tillinghast v. Champlin*, 67 Id. 510. Partnership realty, upon the death of one of the partners, retains its character of real estate and descends to the heir: *Stroud v. Stroud*, Phill. (N. C.) 526, citing the principal case.

EQUITY REGARDS LAND BELONGING TO PARTNERSHIP as personalty, and governs it by rules applicable to that class of property: *Arnold v. Wainright*, 80 Am. Dec. 448, and note 455; *Buchan v. Sumner*, 47 Id. 305. In equity, a partnership agreement devotes the firm realty to firm purposes, and establishes a trust in it to secure the partnership debts in case of insolvency, to the postponement of the individual debts of the partners: *Mendenhall v. Benson*, 84 N. C. 650, citing the principal case.

PATRICK v. CARR.

[WINSTON'S EQUITY, 87.]

EQUITY WILL NOT COMPEL SHERIFF, who has sold land under execution, to execute a deed to the purchaser, who offers and has always been ready to pay the purchase-money. To compel the execution of a deed in such case is the exclusive function of the court under whose authority the sheriff acted in making the sale.

THE opinion contains the facts.

Strong, for the defendants.

Plaintiffs were not represented by counsel.

By Court, PEARSON, C. J. The demurrer raises the question whether the jurisdiction of a court of equity can be invoked to

compel a sheriff, who has sold land under an execution (the judgment and execution and sale being in all respects regular), to execute a deed to the purchaser, who offers and has always been ready to pay the purchase-money; in other words, to compel a sheriff to do his duty. This has hitherto been considered the exclusive function of the court under whose authority he acted in making the sale. We are at a loss to conceive under what head of equity this jurisdiction is supposed to be embraced, in the absence of an argument in support of the equity of the bill, or of any reference to a precedent for the exercise of the jurisdiction. The purchaser has a plain and an adequate and a speedy remedy at law by putting the sheriff under a rule.

We can see no special ground for the interference of this court. It is true, the bill alleges that after the sale, and in fraud of it, the execution continued to be issued, the sheriff having made no return of the sale; and thereupon a second sale was made by the new sheriff, at which sale the old sheriff, one of the defendants in this case, became the purchaser. But there is no allegation that a deed has been executed to the defendant Carr, the old sheriff. We are inclined to the opinion that if a deed had been executed to him by the new sheriff, in completion of the second sale, that would have been a ground for coming into this court; for thereby the title would have passed to him as an individual, which might have rendered it impossible for him to comply with a rule of the court out of which the execution issued, to make title, under his power of sale as sheriff, to the plaintiff; and thereby made it necessary to convert him into a trustee, holding the legal title, on the ground that he had acquired it by fraud.

But there is no allegation that there was a deed to him. So he has not acquired the legal title, and there is no ground for equity to assume jurisdiction in order to convert him into a trustee.

Demurrer sustained, and bill dismissed, with costs.

POWER OF EQUITY TO COMPEL EXECUTION OF SHERIFF'S DEED. — The principal case is cited in *Skinner v. Warren*, 81 N. C. 376, to the point that the purchaser at execution sale may tender the purchase-money, and demand a deed; and if the sheriff refuses to execute it, may have an order issued out of the court from which the execution issued, to compel the sheriff to make him a deed. But a suit in equity cannot be maintained to compel the sheriff in such case to execute the deed, because this is a part of his official duty, when the terms of the sale have been complied with and the purchase-money paid, which will be enforced by an order of the court from which the execu-

tion issued: *Fox v. Kline*, 85 Id. 177, also citing the principal case. There is some doubt as to whether the doctrine enunciated in the principal case is correct. The few authorities on the subject leave the question in the most unsatisfactory condition. It has been said that the authority of the sheriff to make a deed for land sold on execution is derived from statute, and no court except that under whose process he acts can exercise supervision over his proceedings. The provisions of the statute must be pursued, and furnish the only remedy in the case. Equity cannot aid the imperfect execution of a statutory power: *Ware v. Johnson*, 55 Mo. 500-503; see also *Rover on Judicial Sales*, 2d ed., sec. 963. On the other hand, it has been held that a purchaser at sheriff's sale may pray the aid of a court of equity to perfect his title, and such aid will be extended him, provided his proofs are clear and satisfactory: *Hamilton v. Bradley*, 5 Hayw. (N. C.) 127. In *Witham v. Smith*, 5 Grant (U. C.), 203-207, objection was made that equity ought not to entertain a bill to compel the sheriff to execute a deed to the purchaser of land at execution sale, as this was within the exclusive power of the court whose officer he was. And the court say: "It would seem to be an answer to the objection, that the court does not interpose to compel him to do his duty as a public officer. But having entered into a contract in that capacity with a third person, a right springs up on the part of that person to have that contract enforced, and the proper forum for enforcing that right is in this court. This court would interfere, therefore, not to compel a sheriff to perform his official duty, but to give effect to an equity which has accrued to a third person. Upon this point, however, we do not mean to give any decided opinion." No doubt, a court of equity would entertain a bill to enforce the execution of a deed to a purchaser of land at sheriff's sale, where the purchase-money had been paid, and the sheriff had died before executing the conveyance: *Stewart v. Stokes*, 73 Am. Dec. 429.

BAKER v. EVANS.

[WINSTON'S EQUITY, 109.]

TRUST IN LAND, CREATED IN FAVOR OF INSOLVENT, either with or without full consideration, may, in the absence of fraud, be enforced in equity by the beneficiary against the trustee.

THE opinion contains the facts.

Leitch, for the plaintiff.

Defendant was not represented by counsel.

By Court, MANLY, J. The facts as established by the pleadings and proofs are, that the land of complainant, being sold under execution for debt, was purchased by Daniel McMillan for the small sum of ten dollars. The purchaser was afterwards induced, through the representations of neighbors, to compassionate the condition of complainant, and to convey the land to Thomas N. McLeran for the consideration of twenty-five dollars; the said McLeran agreeing to hold the land in trust for the benefit of plaintiff. At the same time

some other small effects were conveyed in augmentation of the trust fund.

After the lapse of a few years McLeran concluded, for the more convenient management of the trust property, to sell the land, and to hold the proceeds thereafter as an interest-bearing fund. He accordingly sold for \$750, and took the bond of the purchaser.

It seems that at the time of the execution sale, and since, down to the time of the sale to McLeran, the complainant was indebted to a larger amount than he could pay.

After the death of McLeran, the validity of the trust being denied by his executrix, complainant filed his bill, setting forth the above facts, and praying for an account of the funds and the paying the balance found to belong to the same into the hands of Geddie as a trustee.

The answer of the executrix, Mary Ann Evans, does not deny the above state of facts in any material particular; but makes the point, whether an arrangement made as this was, for the ease, favor, and comfort of a debtor, is a trust which will be enforced in the courts.

Such is the case presented, and upon proper consideration of it we see no reason why the trust should not be enforced. No injustice has been done to creditors. A *bona fide* and indefeasible title was acquired by McMillan through his purchase, and it was entirely competent for him to do with it as he pleased,—to keep it, or to convey it away; to convey it either with or without full consideration, and either with or without conditions or trusts annexed thereto. When, therefore, McMillan responded to the call made on his pity, and assigned over the benefit of his purchase to Baker in such way as to secure it from seizure by his creditors, he conferred, it is true, a benefit upon the debtor, but did no wrong to the creditor, for it was not at his expense. The advantageous bargain which he assigned over had not been acquired by any covinous or fraudulent contrivance or understanding between the debtor and purchaser. The sale was by execution, and the purchase was in good faith for the purchaser's benefit. That he afterwards changed his mind, and made an almost gratuitous conveyance of it for the benefit of complainant, is no discredit, but is a transaction eminently fit to be enforced. There is no rule of law or equity which forbids liberality among men, provided they are liberal with their own and do no injustice to the rights of others.

Whether the fund may not be reached by creditors upon proper proceedings instituted for this purpose, we express no opinion, as such question is not now before us.

This court is of opinion the plaintiff is entitled to an account of the trust fund, to the end that it may be put into the hands of a proper trustee for plaintiff's use.

Let there be a decree for an account.

BENEFICIARIES MAY ENFORCE TRUST: *Lexington Life etc. Ins. Co. v. Page*, 66 Am. Dec. 165; *Switzer v. Skiles*, 44 Id. 723, and note 731.

THE PRINCIPAL CASE IS CITED in *Ferguson v. Haas*, 64 N. C. 778, where it is held that where there has been a change of possession of property under a trust deed, "and, by any means other than a declaration of an express trust in writing, the trust estate becomes disjoined from the legal estate, parol evidence of the acts, dealings, and declarations of the parties becomes competent to ascertain the nature and limits of such trust."

CASES
IN THE
SUPREME COURT
OF
OHIO.

RUNYAN v. PRIOR.

[15 OHIO STATE, 1.]

TRIAL COURT MAY EXERCISE REASONABLE DISCRETION IN APPLYING OR RELAXING RULES FOR INTRODUCTION OF TESTIMONY, according to circumstances apparent only to the court itself, and a strict uniformity, at all times, is not to be expected.

ORDER OF INTRODUCTION OF EVIDENCE IN CONTESTING WILL. — In a suit to contest the validity of a will, the contestees offered in evidence the alleged will, with the order of the court admitting it to probate, and rested their case. The contestant then concluded his testimony impeaching the validity of the will, after which the contestants were permitted to introduce general evidence against the objection of the contestant, sustaining the will. *Held*, that the evidence was properly admitted.

WITNESS MUST BE INTERROGATED AS TO STATEMENTS MADE BY HIM OUT OF COURT before such statements can be given in evidence to impeach the witness; and this rule is not affected by the fact that the opportunity for such examination has been cut off by the death of the witness.

OPINION OF WITNESS AS TO SANITY OF TESTATOR must relate to the time of his examination, and his opinion at a period anterior cannot be called for upon the direct examination.

WITNESS CANNOT BE ASKED HIS OPINION AS TO CAPACITY OF TESTATOR to make a will. Such inquiry involves a matter of law, and also assumes that the witness knows the degree of capacity required to perform the act in issue.

ERROR to the district court of Hamilton County. The opinion states the case.

G. E. Pugh, for the plaintiff in error.

J. L. Miner and John W. Caldwell, for the defendants in error.

By Court, WHITE, J. The original suit was a bill in chancery filed in the court of common pleas of Hamilton County June 3, 1853, to set aside the alleged will of William Runyan, deceased, late of said county, and which had been admitted to probate. The case was appealed to the district court, and at the April term, 1861, a verdict and decree was rendered sustaining the will. Several exceptions were taken by counsel for the plaintiff in error to the rulings of the court on the trial of the issue, which are embodied in a bill of exceptions, and form part of the record sought to be reviewed by this proceeding.

1. It appears by the bill of exceptions that the contestees offered in evidence the original writing alleged to be the last will and testament of William Runyan, deceased, together with the order of the court of common pleas admitting the same to record, and then rested their case, "without offering the testimony of the subscribing witnesses to the will."

The following extracts from the bill of exceptions disclose the grounds of the first assignment of error:—

"And thereupon the plaintiff in the case, the contestant of the will, introduced a large number of witnesses, who were sworn and testified to facts tending to prove that said testator was of unsound mind, and incapable of understanding or making a will at the time said will purports to have been executed; also tending to show that the man who drew the will lived five or six miles from the testator; that he drew it from a written note presented to him by William Price, one of the devisees, purporting to be written by William Runyan; and tending to show that said Runyan was incapable of writing a note at the time.

"And the said contestant having finished the testimony, the defendants in the suit holding the affirmative of the issue before the jury, offered testimony to prove the competency of the said William Runyan, and his sound state of mind at the date of the making of the will. To the introduction of which testimony the counsel for the contestant objected, on the ground that it was incompetent for said propounders of the will, after having rested their case, to bring in new and additional evidence to prove the competency of the testator to make the will after the contestant had given his testimony; not objecting, however, to the introduction of testimony to rebut the evidence of contestant on matters not connected with the testator's soundness of mind.

"Notice was given to the counsel of the propounders of the will, before they rested their case, or testimony in chief, by the counsel for the contestant, that the latter would object to the introduction of such additional testimony to prove the competency of the testator to make a will after the evidence of the contestant should be closed.

"But the court overruled the objection of the contestant, and permitted them [the contestees] to examine the subscribing witnesses to said will, and other witnesses, tending to prove the competency of said testator to make said will."

The general rules for the introduction of testimony must necessarily be so often applied or relaxed, according to circumstances apparent only to the court engaged in conducting the trial, that a strict uniformity at all times is not to be expected, and indeed, in some instances would prove injurious to the interests of justice. Much, therefore, is confided to the discretion of that court, which, though it should not be exercised by an arbitrary strictness on the one hand, or arbitrary indulgence and relaxation on the other, should never be withheld from its office in proper cases: 2 Phill. Ev. 878, note 570; *Graham v. Davis*, 4 Ohio St. 381 [62 Am. Dec. 285].

The statute prescribes the mode of contesting a will, as well as the issue to be made up; viz., "whether the writing produced be the last will of the testator or not," which is required to be tried by a jury. It further declares that "the order of probate shall be *prima facie* evidence, on the trial of said issue, of the due attestation, execution, and validity of said will." This statutory presumption is as comprehensive in its operation as the issue. The order of probate is a fact submitted to the jury on the trial of the issue; and from this fact flows the presumed existence of every other necessary to establish the validity of the will in question. There are no pleadings to which the evidence must be confined, and with the allegations of which it must correspond. "There are strictly no parties; both sides are actors in obedience to the order directing the issue." In all cases alike the will may be assailed upon any and all the grounds that would expose its invalidity. But what particular objections may be supposed to be available, and be offered in evidence in any given case, can only be known as it may be developed in the testimony offered by those opposing the will. They may relate solely to frauds and undue influence, supposed to have been practiced upon the testator, or to his supposed want of mental capacity,

or the absence of due execution on his part, or of the due attestation.

To require those affirming the will either to finally rest their case on the order of probate, or otherwise, in anticipation of attacks that may or may not in fact be made, to introduce all the evidence they may have sustaining the will, on every ground on which it may be competent for the adverse parties to attack it, would not, in our opinion, promote either the convenience of those charged with the trial or the justice of the case, but would tend to contrary results.

The court therefore, in our opinion, did not err in overruling the objection referred to.

2. It appears by the bill of exceptions that one of the subscribing witnesses (Francis S. Bowen) had deceased before the trial in the district court, "and his testimony, taken before the court of common pleas when the will was admitted to record, was read." Whereupon the contestant offered in evidence certain declarations of Bowen respecting the capacity of William Runyan to make a will at the time when the writing in question purports to have been executed. These declarations were made at other times, and, as stated in the bill of exceptions, tended "to show he had made different statements at different times as to the condition of said William Runyan and his capacity to make a will,—sometimes asserting he was competent, at other times saying he was incompetent, to make a will at the time the will was made." To the admission of evidence of these declarations the contestees objected, and the court sustained the objection; to which exception was taken.

The counsel for the plaintiff in error, in support of this exception, cites and relies upon the cases of *Aveson v. Kinnaird*, 6 East, 195, 196, in which Lord Ellenborough refers, with approval, to a *nisi prius* case decided by Mr. Justice Heath, and the case of *Wright v. Littler*, 3 Burr. 1255, and to the case of *Doe v. Ridgway*, 4 Barn. & Ald. 53. These were cases in which the genuineness of the execution of certain written instruments were in issue. In each case an attesting witness to the supposed execution had died, and the party supporting the instrument, being at liberty to give secondary evidence of its execution, had proved the handwriting of such witness in the attestation, whereby a presumption arose that the instrument had been duly executed. Declarations of the deceased witnesses were admitted, impeaching the execution.

The principle assigned for the admission of the evidence by Lord Ellenborough and Justice Baily was that if the subscribing witness could have been produced at the trial to prove his handwriting, it must have been done; and as it would have been competent to prove, by his confession on cross-examination, his declarations as to the forgery, or if denied, by other proof, so also, as a personal examination of the witness could not be had, his declarations might be proved in contradiction to the presumption of a due execution of the instrument from the proof of his handwriting as a subscribing witness. The case of *Wright v. Littler*, 3 Burr. 1255, the origin and foundation of the others, was peculiar in its facts, and according to the report of the same case in 1 W. Black. 849, Lord Mansfield stated that no general rule could be drawn from the admission of the evidence in that particular case. The opinion expressed upon the point in question is supposed to have been influenced by an opinion which prevailed at that time as well as at the time of the *nisi prius* decision of Justice Heath, that any declaration *in extremis* was admissible, on the ground that they were made under a sanction equivalent to an oath,—an opinion which subsequent decisions clearly show to have been erroneous, and that this exceptional rule of evidence is properly applicable only where the death of the declarant is the subject of the charge, and the circumstances of the death the subject of the declaration: *Rex v. Mead*, 2 Barn. & C. 605.

These cases came under review, and were critically examined in *Stobart v. Dryden*, 1 Mees. & W. 614, and were substantially overruled. The suit was an action on a covenant in a mortgage deed, to which there was a plea of *non est factum*, tried before Lord Abinger in the summer of 1835. A man named McCree, who, on the face of the instrument, appeared to be the subscribing witness, being dead, the execution of the deed was proved in the usual way, by evidence of his handwriting. Mr. Cresswell, for the defendant, offered in evidence declarations of McCree, of facts tending to prove that the deed was a forgery, which Lord Abinger rejected; and on a motion in the following term, a rule *nisi* for a new trial was granted, which was argued, and the court, having taken time to consider the question, say (Parke, B.): "We who heard the argument are all of opinion that the evidence was properly rejected." After examining and overruling one of the grounds upon which the admissibility of the evidence was argued, the court proceed to say: "The other ground,

and the principal one, on which the most reliance was placed, was that it was in the nature of a substitute for the loss of the benefit of the cross-examination of the subscribing witness, if he had been alive and personally examined; by which either the fact confessed would have been proved, or if not, the witness would have been liable to be contradicted by proof of his admission; and it was contended that every declaration was admissible which might have been given in evidence to impeach the credit of the witness himself on his personal examination. Let us inquire what authorities are in support of this exception." After examining the authorities referred to, and declaring that, by the adoption of the rule, the rights of parties under wills and deeds would be liable to be affected at remote periods by loose declarations of attesting witnesses, which those parties would have no opportunity of contradicting or explaining by the evidence of the witnesses themselves, Parke, B., adds: "The party impeaching the validity of the instrument would, it is true, have an equivalent for the loss of his power of cross-examination of the living witness; but the party supporting it would have none for the loss of his power of re-examination. And when the great benefit to the administration of justice, of abiding by general rules, and acting upon general principles, is taken into consideration, we feel no doubt but that it would be inexpedient to sanction this additional exception to the established rule of evidence."

This case has received the approval of Mr. Phillips in the last edition of his treatise on the law of evidence (vol. 1, p. 286), and of Mr. Greenleaf in his work (vol. 1, sec. 126).

The last-named case is unlike the one before us, as in the latter the testimony of the witness whom it was sought to impeach had been taken and was read on the trial. But if the presumption of due execution, arising from the witness's voluntary act of attestation, done without any particular sanction, can in no degree be rebutted, or its credit impeached by his subsequent declaration, it would seem *a fortiori* that the same principle would forbid their use to destroy the credit which would be otherwise due to his testimony, delivered under the sanction of an oath in a judicial proceeding, in obedience to legal requirement.

In the case of *Losee v. Losee*, 2 Hill, 609, cited by counsel for plaintiff in error, the impeaching evidence received was in regard to the general character of the attesting witness. Of course, there could have been no objection to impeaching the

testimony of the witness in the present case by that kind of evidence; but the question here is, whether the declarations offered could legitimately have had that effect.

The act relating to wills provides that, in admitting a will to probate, the court shall cause the witnesses to be examined in open court, and their testimony reduced to writing and filed; but if their presence cannot be secured, they are to be examined by some suitable person, or persons, under a commission.

The twenty-third section provides that "a certified copy of the testimony of such of the witnesses examined upon the original probate as are out of the jurisdiction of the court, dead, or have become incompetent since the probate, shall be admitted in evidence upon such trial." But for this provision of the statute such evidence would not be competent. The statute gives it the effect of a deposition. It was under this section that the testimony of the witness Bowen was admitted.

It is clearly established in England and in most of the United States, including our own, that before a witness can be impeached by proving statements out of court, at variance with his testimony, he must be first inquired of, upon cross-examination, as to such statements, and the time, place, and person involved in the supposed contradiction: *King v. Wicks*, 20 Ohio, 87.

Without controverting this as the general rule, it is, however, claimed, on behalf of the plaintiff in error, that this case forms an exception, inasmuch as the testimony taken on the probate of the will was without the ordeal of a cross-examination, and the death of the witness prior to the final trial had cut off the opportunity of such examination.

It may here be remarked that one of the counsel of the defendants in error insists in his argument that the witness was, in fact, fully cross-examined when his testimony was taken. But the record as to this matter shows no more than has been already stated, and to the record alone our inquiries are confined.

But to recur to the claim that this case forms an exception to the general rule. The terms in which the rule is expressed imply no such exception; and one of the questions submitted to the twelve judges in the Queen's case was, whether, when the alleged impeaching matter was discovered after the witness had been examined, it might not be given in evidence without calling back the witness. The answer, delivered by Chief Justice

Abbott, was, that the only effect of a subsequent discovery would be to allow the witness to be called back for further cross-examination, if still within reach; and they were all of opinion, that according to the usage and practice of the courts below, and according to law as administered in those courts, the proposed proof could not be adduced without a previous cross-examination of the witness as to the matter thereof: *Smith v. Doe ex dem. Jersey*, 2 Brod. & B. 812, 813.

And in view of the claim that has been sometimes made, that the judges in this case introduced a new rule of practice, it is worthy of remark that they did not regard themselves as doing so, for they stated it to be the usual practice of the courts, to which they were not aware of any exception. Mr. Phillips, in the edition of his work on evidence, to which reference has already been made, states it as an indispensable condition of the rule; and the same has been held in New York: *Stacy v. Graham*, 14 N. Y. 499.

If the case where the contradictory statements are discovered after the examination of the witness, and so late as to place his recall beyond the power of the party, does not form an exception, no good reason is perceived why the case should where his testimony, taken in any other legal form, is used, and the opportunity of cross-examination has been lost by his death. It cannot depend upon the diligence of the party, for no laches would exist in the former case, and might not in the latter; nor upon mere convenience, otherwise, when at the trial the discovery came too late for the recall of the witness, the impeaching testimony would be admitted.

The true principle of the rule seems to be, as was declared by Comstock, J., in *Stacy v. Graham*, 14 N. Y. 499, that the witness whose testimony is to be impeached, and the party to be affected thereby, are entitled of right to any explanation which the former can give of the statements imputed to him. And it seems to us, that to allow the death of the witness to work an exception would be to destroy the principle on which the rule rests, and deny the protection which it was designed to afford. The party impeaching the witness would have an equivalent for the loss of his power of cross-examination, but, as remarked by Parke, B., in *Stobart v. Dryden*, 1 Mees. & W. 614, the party supporting him would have none for the loss of his power of re-examination and explanation. In relieving one party of a supposed hardship, an equally serious one might be inflicted on the other. The proposed evidence is indepen-

dent, collateral matter. It is not a legitimate means of proving the general character of the witness for truth, which is, of course, open to the party seeking to impeach the testimony. Such declarations have all the infirmity of hearsay; and though they are not offered as evidence of the truth of the matter declared, and thereby as directly tending to prove the matter in issue, yet, if admissible, it is because they should have a material bearing upon the determination of the issue. Without, therefore, the opportunity to the witness of explanation, or to the party against whom offered, of re-examination, we are of opinion that the supposed declarations lack the elements of credibility which they should possess, before they can be used, legitimately, to destroy the testimony of the witness.

The rule has frequently been applied to depositions also, — to the case where it was proposed to impeach the testimony contained therein by showing that the witness, subsequently to his examination, had made statements inconsistent with his testimony, or said that what he had sworn to was false: *Stacy v. Graham*, 14 N. Y. 293; *Kimball v. Davis*, 19 Wend. 437; *Brown v. Kimball*, 25 Id. 259; *Conrad v. Griffey*, 16 How. 41; *Unis v. Charlton*, 12 Gratt. 484.

In *Kimball v. Davis*, 19 Wend. 437, the court say: "The declarations of witnesses whose testimony has been taken under a commission, made subsequent to the taking of the testimony, contradicting or invalidating their testimony as contained in the depositions, is inadmissible in evidence if objected to. The only way for a party to avail himself of such declarations is to sue out a second commission. Such evidence is always inadmissible until the witness whose testimony is thus sought to be impeached has been examined upon the point, and his attention particularly directed to the circumstances, so as to furnish him an opportunity for explanation or exculpation." The opinion of the court in this case was delivered by Chief Justice Nelson, the same judge who decided *Losce v. Losce*, 2 Hill, 609, cited by plaintiff in error, and before referred to. The decision was affirmed in the court of errors: *Brown v. Kimball*, 25 Wend. 259, Chancellor Walworth delivering the leading opinion.

We are aware that the application of the rule to depositions has in some cases been denied, or applied with various modifications: *Downer v. Dana*, 19 Vt. 344; *Fletcher v. Henley*, 18 La. Ann. 191; *Roberts v. Collins*, 6 Ired. 223; *Hooper v. Moore*, 3 Jones, 428.

But a majority of the court are of opinion that the weight of authority, as well as the principle upon which the rule is founded, requires the application of the rule to the present case, and that the district court did not err in overruling the proposed evidence.

3. The third assignment of error is based on this paragraph in the bill of exceptions:—

“The contestant also offered Thomas Shepherd, who was sworn as a witness, and testified that he lived near to the deceased [William Runyan], and frequently saw him about the time, and before the time, of making the will; that a short time before the making the will deceased called at his house at midnight, and testified to what he said and how he acted; and that the night before the making of the will he was called upon by Francis Bowen about sundown and requested to meet him at the testator's early the next morning to witness the will of William Runyan. He did not go, however, to witness the will.

“And thereupon the counsel for the contestant propounded the following question to the witness: ‘State what your opinion was, on the evening Bowen called upon you to witness the will, as to the sanity or insanity of William Runyan, or his capacity to make a will.’ To which question counsel for the contestees objected, and the court sustained the objection.”

To this question there are two valid objections apparent.

In the first place it sought the opinion of the witness, not at the time of the delivery of his testimony, but the opinion he had entertained several years before, and which subsequent consideration and reflection may have satisfied him was erroneous. This was on the examination in chief by the party of his own witness. As well might he have claimed to prove the occurrence of facts by interrogating the witness as to his understanding or recollection in regard to them years before, instead of at the time of his examination.

Secondly, the question called upon the witness to state what his opinion was as to the capacity of the testator to make a will. This branch of the inquiry involved a question of law and fact, and, to the extent that capacity was involved in the issue, the very question to be determined by the jury. It furthermore assumed that the witness knew the degree of capacity which the law required for the performance of the act of executing a will.

The foregoing are all of the assignments of error noticed by

counsel in their arguments, and the only ones upon which we deem it necessary to remark.

The judgment will be affirmed.

BRINKERHOFF, C. J., and SCOTT, J., concurred.

RANNEY and WILDER, JJ., dissented as to the second proposition of the *syllabus*.

BRINKERHOFF, C. J. If we look at the principal question decided in this case simply as one of judicial policy, without reference to the authority of adjudged cases, it seems to me that a reason, in addition to any that I have yet heard stated, may be found in favor of our conclusion in the following considerations:—

“Dead men tell no tales”; and if the rule be once established that the testimony of a deceased witness may be impeached by giving in evidence declarations alleged to have been made by him out of court differing from those contained in his testimony, and when he has had no opportunity for explanation,—when all opportunity for explanation by him has passed away,—when few will have the motive and none the power to vindicate his integrity and truthfulness such as he would have if living,—it seems to me that temptations to perjury and subornation would be not a little increased by the comparative impunity with which those crimes might be committed. Such declarations, at best, are the lowest kind of evidence; and the administration of justice will suffer little in any case by their exclusion; while, if admitted, and they are falsely alleged against a dead witness, it would be hardly possible ever to disprove them.

IMPEACHMENT OF WITNESS by evidence of prior contradictory or corroborative statements: See *Hedge v. Olapp*, 58 Am. Dec. 424; *Wright v. Hicks*, 60 Id. 687; *Allen v. State*, 73 Id. 760, and note 762.

OPINION OF WITNESS AS TO VALUE OF LAND IN CONTROVERSY: See *Flint v. Flint*, 83 Am. Dec. 615.

OPINIONS OF WITNESSES GENERALLY: See *Joyce v. Maine Ins. Co.*, 71 Am. Dec. 536, and note 538; *Atlantic etc. R. R. Co. v. Campbell*, 64 Id. 607, and note; *Emerson v. Lowell Gas Light Co.*, 83 Id. 621.

ADMISSIBILITY OF DYING DECLARATIONS: See *Barfield v. Britt*, 62 Am. Dec. 190; *State v. Shelton*, 64 Id. 587; *Commonwealth v. Cooper*, 81 Id. 762.

THE PRINCIPAL CASE IS CITED to the point that where dying declarations are proved in a case, a statement of the deceased made at another time, which is neither a dying declaration nor a part of the *res gestæ*, is not admissible to impeach such declarations, in *Wroe v. State*, 20 Ohio St. 472; it is cited in support of the general rule, that dying declarations are admissible

only when the death of the declarant is the subject of the charge, and the circumstances of the death are the subject of the dying declarations, in *State v. Harper*, 35 Id. 80; and is cited to the point that it is necessary, in cases of impeachment or attempted impeachment by contradictions, that a foundation should be laid, by stating to the witness sought to be contradicted the time, place, and persons involved in the alleged contradictions, in *Kent v. State*, 42 Id. 429.

STOFFER v. STATE.

[15 OHIO STATE, 47.]

ORIGINATOR OF MALICIOUS ASSAULT, WHO CONTINUES IN CONFLICT WHICH ENSUES, is not justified in taking the life of his adversary, however necessary it may be to save his own, or to whatever extremity he may be reduced. But when he wholly withdraws from the conflict, and has in good faith retreated to a place of apparent security, he is again remitted to his right of self-defense.

WHEN CLEARLY SHOWN THAT WITNESS HAS COMMITTED PERJURY IN ONE MATERIAL POINT, the testimony must be wholly rejected, and cannot be relied upon for any purpose whatever, in accordance with the maxim, *Falsus in uno, falsus in omnibus*.

ERROR to the common pleas of Tuscarawas County. The facts are stated in the opinion.

D. W. Stambaugh and J. C. Hance, for the plaintiff in error.

L. R. Critchfield, attorney-general, A. L. Neely, and A. W. Patrick, for the state.

By Court, RANNEY, J. The plaintiff in error was indicted in the court of common pleas of Tuscarawas County for the murder of Montgomery Webb, and upon the trial was found guilty of manslaughter, and sentenced to the penitentiary for six years.

The refusal of the court to give certain instructions to the jury, as prayed for by him, as well as the instructions given, are assigned for error, and for that cause alone he seeks a reversal of the judgment.

Upon the argument, two questions, of very considerable nicety and practicable importance, have been presented, which we shall proceed to dispose of in the order in which they appear in the record.

1. From the bill of exceptions it appears that after the state had given evidence tending to prove that the plaintiff made an assault upon Webb in the street, with the intent to murder him with a knife, and that in the conflict which ensued Webb was killed by him, the plaintiff in error gave evidence tending

to prove that he desisted from the conflict, declined further combat, and retreated rapidly a distance of 150 feet, and took refuge in the house of a stranger, where he shut and held the door; that Webb, his brother, and one Dingman immediately pursued, throwing stones at him, and crying, "Kill him," as he retreated, and forcibly opening the door, they entered the house and assaulted him, and in the conflict which immediately ensued, Webb was killed.

Upon this state of the evidence, counsel for the plaintiff in error requested the court to instruct the jury that the killing of Webb would be excusable, although the accused should have made the assault upon him with the malicious intent of killing him, if the jury should find that, before Webb had received any injury, the accused desisted from the conflict, and in good faith declined further combat, and retreated to a place which he might reasonably regard as a place of security, and that Webb and those in concert with him immediately pursued and forcibly entered such place, and there made an assault upon the accused, in such manner as to warrant him in believing that his life was in danger at the hands of Webb, and without deliberation or malice, and to save his own life, he took that of Webb.

This instruction the court refused to give, but in substance charged the jury that, under such circumstances, the accused would be guilty of manslaughter, provided they "should regard the conduct of Webb from the commencement of the conflict in the street to the time of the conflict in the house as continuous."

The difference between the instruction asked and that given is easily appreciated. The one makes the conduct of the accused in declining, in good faith further conflict, and retreating to a place of supposed security from the attacks of Webb, decisive of his right to defend himself there, when afterwards assaulted by Webb and those in concert with him, and if necessary to save his own life, without malice or premeditation, to take that of Webb; while the other makes the conduct of Webb the test whether the conflict had so far terminated as to restore the accused to his right of self-defense, and denies him this right if the conduct of Webb, from the conflict in the street to that in the house was to be regarded as continuous. We are not permitted to regard this retreat of the accused as either colorable or made to gain an advantage, with a view of renewing the assault upon Webb.

The instruction requested assumed that it must have been made with the *bona fide* purpose of abandoning the conflict; and in the instruction given, the jury were charged that if the attack upon Webb in the street was murderous, the fact that the accused "repented and fled, . . . intending to quit the combat, and abandoning all murderous purpose," would have no further effect than to mitigate the crime to manslaughter.

Upon the precise question made in this case, very little light is thrown by actual adjudications; and it is not to be denied that some difference of opinion has obtained among elementary writers upon criminal law. The learned and humane Sir Matthew Hale has expressed an opinion upon the very point in accordance with the instruction requested in the court below. He says: "Suppose that A by malice makes a sudden assault upon B, who strikes again, and pursuing hard upon A, A retreats to the wall, and in saving his own life kills B, — some have held this to be murder, and not *se defendendo*, because A gave the first assault. But Mr. Dalton thinketh it to be *se defendendo*, though A made the first assault, either with or without malice, and then retreated. It seems to me that if A did retreat to the wall upon a real intent to save his life, and then mercly in his own defense killed B, that it is *se defendendo*; and with this agrees Stamford's P. C., lib. 1, c. 7, fol. 15 a. But if, on the other side, A, knowing his advantage of strength, or skill, or weapon, retreated to the wall merely as a design to protect himself under the shelter of the law, as in his own defense, but really intending to kill B, then it is murder or manslaughter, as the circumstance of the case requires": 1 Hale P. C. 479, 480.

Sergeant Hawkins, however, thinks this opinion too favorable, and insists that the one who gives the first blow cannot be permitted to kill the other, even after retreating to the wall; because the necessity to which he is at last reduced was brought upon himself: 1 Hawk. P. C. 87.

Later English writers have generally contented themselves with stating the opposing opinions of these eminent authors, without adding anything material upon the subject: 4 Bla. Com. 186; 1 Russell on Crimes, 662.

In our own country, Mr. Bishop, in his work on criminal law, has examined the whole subject with learning and ability, and coinciding, as we understand him, in the opinion expressed by Lord Hale, he thus expresses his own conclusion: "The space for repentance is always left open. And when the com-

batant does in good faith withdraw as far as he can, really intending to abandon the conflict, and not merely to gain fresh strength or some new advantage for an attack, but the other will pursue him, then, if taking life becomes inevitable to save life, he is justified": 2 Bishop's Crim. Law, sec. 566.

But if the question cannot be said to be settled upon authority, we think its solution upon principle very obvious, in the light of doctrines upon which all are agreed. It is very certain that while the party who first commences a malicious assault continues in the combat, and does not put into exercise the duty of withdrawing in good faith from the place, although he may be so fiercely pressed that he cannot retreat, or is thrown upon the ground, or driven to the wall, he cannot justify taking the life of his adversary, however necessary it may be to save his own; and must be deemed to have brought upon himself the necessity of killing his fellow-man. "For otherwise," as said by Chief Justice Hale, "we should have all cases of murder or manslaughter, by way of interpretation, turned into *se defendendo*": 1 Hale P. C. 482.

There is every reason for saying that the conduct of the accused, relied upon to sustain such a defense, must have been so marked in the matter of time, place, and circumstance as not only clearly to evince the withdrawal of the accused in good faith from the combat, but also such as fairly to advise his adversary that his danger had passed, and to make his conduct thereafter the pursuit of vengeance rather than measures taken to repel the original assault. But when this is made to appear, we know of no principle, however criminal the previous conduct of the accused may have been, which allows him to be hunted down and his life put in jeopardy, and denies him the right to act upon that instinct of self-preservation which spontaneously arises alike in the bosoms of the just and the unjust. There is no ground for saying that this right is forfeited by previous misconduct; nor did the court below proceed upon any such idea, since the jury were charged, that, if the conflict which ensued upon the first assault had ended, and a new one was made by Webb and his associates in the house, the accused, under reasonable apprehension of loss of life or great bodily harm, would be justified in taking the life of his assailant. The error of the court consisted in supposing that whatever might be done by the accused to withdraw himself from the contest, the conflict would never end so long as Webb made continuous efforts to prolong

it. If this is a sound view of the matter, the condition of the accused would not have been bettered if he had fled for miles, and had finally fallen down with exhaustion, provided Webb was continuous in his efforts to overtake him. But this view is consistent with neither the letter nor spirit of the legal principle. A conflict is the work of at least two persons, and when one has wholly withdrawn from it that conflict is ended; and it cannot be prolonged by the efforts of him who remains to bring on another. It is very true that the original assault may have aroused the passions which impel the pursuer to take vengeance upon his adversary; and if death should ensue from his act, it might be entirely sufficient to mitigate the crime. But it would still be a crime, and the law cannot for a moment tolerate the execution of vengeance by private parties. If this were allowed, such passions might be as effectually aroused by words as blows; and instead of the principle, so vital to the peace of society, that the law alone must be relied upon for the redress of all injuries, we should have avengers of injuries, real or supposed, executing their punishments upon victims stripped of all legal power, whatever might be the necessity of defending their own lives. It is needless to say that such a course would be alike destructive to public order and private security, and would be substituting for the empire of the laws a system of force and violence.

A line of distinction must be somewhere drawn, which, leaving the originator of a combat to the necessary consequences of his illegal and malicious conduct, shall neither impose upon him punishments or disabilities unknown to the law, nor encourage his adversary to wreak vengeance upon him rather than resort to the legal tribunals for redress; and we think, upon principle and the decided weight of authority, it lies precisely where we have already indicated. While he remains in the conflict, to whatever extremity he may be reduced, he cannot be excused for taking the life of his antagonist to save his own. In such case it may be rightfully and truthfully said that he brought the necessity upon himself by his own criminal conduct. But when he has succeeded in wholly withdrawing himself from the contest, and that so palpably as, at the same time, to manifest his own good faith and to remove any just apprehension from his adversary, he is again remitted to his right of self-defense, and may make it effectual by opposing force to force, and when all other means have failed, may legally act upon the instinct of self-preserva-

tion, and save his own life by sacrificing the life of one who persists in endangering it.

If these views are correct, their application to the case under consideration is very obvious. Both the instruction requested and that given are based upon the hypothesis that the accused had in good faith, and abandoning all criminal purpose, withdrawn from the combat; that he had not only retreated to the wall, but behind the wall; and had not only gone from the view of his adversary, but to a place of supposed security from his attacks. In all this his conduct was strictly lawful. In the language of the books, he "had actually put into exercise the duty of withdrawing from the place." It is very true that the evidence tended to implicate him in a very serious crime in the first attack upon Webb, for which his subsequent conduct could not atone, and for which he was then, and still is, liable to prosecution and punishment; but when Webb and his associates afterward pursued and attacked him, they were wholly in the wrong, and necessarily took upon themselves all the hazards of such an unlawful enterprise.

2. Upon the trial of the case, Frederick Swallow, Philander Webb, and A. I. Dingman were called as witnesses for the state, and each gave testimony material to the issue. Whereupon the accused called sundry witnesses, who gave testimony tending to prove that these three witnesses called for the state had willfully and corruptly testified falsely upon some matter material to the issue in the case, and his counsel requested the court to instruct the jury that if they should find such to be the fact, it would be their duty to disregard the whole of the testimony given by such witnesses. This instruction the court gave as to those portions of the testimony shown to be false, but as to other portions not so shown, and in respect to which the witnesses might be corroborated, the jury were instructed that they might consider such portions in connection with the corroborating testimony, and give it such weight as they thought proper. The statement in the bill of exceptions is not very clear; but we suppose the court intended to say that no fact could be found upon the unaided testimony of such witnesses; but that their testimony might be received and acted upon in connection with corroborating evidence, and such weight be given it as the jury should think proper. This, at least, is the most favorable view of the charge, and if it is the correct one, the naked question is presented, whether the rules of law require the absolute rejection of such testimony.

An ancient maxim of the law of evidence—*Falsus in uno falsus in omnibus*—would seem to import such exclusion by raising a presumption of law, *juris et de jure*, that a witness who is clearly shown to have committed perjury upon one material point in the case should be deemed wholly unworthy of credit upon any other, and his testimony be absolutely rejected. In most of the cases brought to our attention in the argument, where this maxim has been referred to, no attempt has been made to define its limits and proper application; while in many it has been very inaccurately used as applicable to witnesses who have been merely contradicted upon some material point, without raising any just imputation of perjury against them. Among the elementary writers upon evidence whose works have been examined by us, Mr. Starkie alone has stated the solid reasons upon which the maxim rests, and the case to which alone it can be applied. He says: "As the credit due to a witness is founded in the first instance on general experience of human veracity, it follows that a witness who gives false testimony as to one particular cannot be credited as to any, according to the legal maxim, *Falsum in uno, falsum in omnibus*. The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness's testimony cannot be partial or fractional; where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result, his testimony is to be credited or rejected." "It is scarcely necessary to observe," he adds, "that this principle does not extend to the total rejection of a witness whose misrepresentation has resulted from mistake or infirmity, and not from design; but though his honesty remain unimpeached, this is a consideration which necessarily affects his character for accuracy": 1 Stark. Ev. 873.

Now if, as this author says, the presumption that such a witness will speak the truth is wholly gone, and for this reason his testimony is to be rejected, what, in the nature of things, can remain to submit to a jury, and from which they are to make up that complement of proof which establishes facts as a foundation for the judgment of courts? Is not this yielding the witness partial or fractional credit? And that in the face of the fact that before the eyes of the very tribunal which accords him this credit, and in the very proceeding, he has committed willful and corrupt perjury. To say that facts may

be found upon his testimony notwithstanding, or that they may be found in part upon it, is a difference in degree only, and not in principle. The other evidence, although in a greater or less degree corroborative of his, is yet supposed to be insufficient to establish the fact in issue; and it is utterly impossible still to find the fact without giving credit to the perjured witness. But it is said he may still speak the truth upon other points, although perjured as to one or more. This is very true. Very few men are so utterly false as not to be compelled, from the very exigencies of their being, to utter more truth than falsehood. But it must also be admitted that the motive which has prompted him to commit perjury in one part of his testimony may and is very likely to lead him to make it effectual by falsifying other material points. At best, it is left entirely uncertain whether he has uttered truth or falsehood; and it is not consistent with that moral certainty of the existence of facts which the law requires before men are affected in their lives, liberty, or property, to act upon what may be true or false, or to use such corrupt and deceptive instrumentalities in the pursuit of truth. Upon the whole, we are inclined to agree with Mr. Justice Story in his opinion in the case of *The Santissima Trinidad*, 7 Wheat. 283, that "where a party speaks to a fact in respect to which he cannot be presumed liable to mistake, courts are bound upon principles of law, morality, and justice to apply the maxim, *Falsus in uno, falsus in omnibus*." And to ask with him, "What ground of judicial belief can there be left where the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood?"

As remarked by Mr. Starkie: "The character of a witness cannot easily be subjected to minute investigation; the nature of the proceeding usually excludes the benefit which might result from an extended and protracted inquiry, and a jury are under the necessity of forming their conclusions on a very limited and imperfect knowledge of the real characters of the witnesses on whose testimony they are called on to decide": 1 Stark. Ev. 20. In a word, the temptations and opportunities for deception in judicial inquiries are far greater than in the ordinary transactions of life; the tribunals must act promptly and decisively upon all the great interests which men hold valuable; and neither the rights of individuals, nor the moral effect of their determinations, can fail to suffer when they proceed upon evidence which is quite as likely to be deceptive as

otherwise, and their findings as likely to be founded in error as in truth.

We are not unmindful of the fact that persons convicted of crime are no longer excluded as witnesses. But the case of one convicted of perjury, even, in a former proceeding, would differ from this, in the fact that time for reformation would have intervened before he is called to testify, and no clear indication of a motive to commit perjury between the particular parties would be exhibited.

We think the court erred in refusing to give each of the instructions requested, and also in the instructions given, and for that cause the judgment is reversed, and the case remanded for further proceedings.

BRINKERHOFF, C. J., and SCOTT, WILDER, and WHITE, JJ., concurred.

RIGHT TO TAKE LIFE IN DEFENSE OF PERSON is a natural right: *State v. Moore*, 83 Am. Dec. 159.

WHEN HOMICIDE IS JUSTIFIABLE on ground of self-defense: *Wesley v. State*, 75 Am. Dec. 62, and note 69; *State v. Thompson*, 74 Id. 342.

JURY SHOULD NOT BE DIRECTED TO REJECT EVIDENCE OF WITNESS ALTOGETHER, where he has willfully testified falsely as to any one material fact: *Crabtree v. Hagenbaugh*, 79 Am. Dec. 324, and note 327.

THE PRINCIPAL CASE IS OVERRULED upon the second point stated in the syllabus, in *Mead v. McGraw*, 19 Ohio St. 62, the court holding that the maxim, *Falsus in uno, falsus in omnibus*, is, in a common-law trial, to be applied by the jury according to their own judgment for the ascertainment of the truth, and is not a rule of law in virtue of which the judge may withdraw the evidence from their consideration, or direct them to disregard it altogether. Compare *Dye v. Scott*, 35 Id. 194, 201.

McBAIN v. McBAIN.

[15 OHIO STATE, 237.]

TITLE, IF ANY, ACQUIRED BY PLAINTIFF IN EXECUTION UNDER SHERIFF'S DEED, IS DIVESTED by the reversal of an order confirming the sale after the execution of the deed and before any legal conveyance to a third party. The wife of such purchaser, having at most only a contract for a conveyance from him, made after the execution of the sheriff's deed and before the reversal, in consideration of her choses and moneys previously reduced to his possession, cannot, in equity, compel a conveyance of the legal title by the defendant in execution.

PROCEEDINGS IN PARTITION DO NOT DECIDE TITLE or create any new titles and parties to such proceedings, made such by publication, and without actual notice, are not thereby estopped from setting up their legal title.

CIVIL action. Reserved in the district court of Lucas County. The facts are in substance as follows: The defendant McBain had a judgment in his favor against Daniels, another defendant, upon which an execution was issued, and the land in controversy levied upon under it. The sheriff duly advertised the land, and sold it under the levy to said McBain. The sale was confirmed by the court, and the sheriff ordered to make a deed to the purchaser, in pursuance of which he subsequently executed and delivered such deed to McBain. A proceeding to obtain a partition of the land was instituted by McBain, Daniels being made a party defendant by publication, and the partition was made and confirmed by the court. Subsequently McBain executed a deed of the land to his wife, in accordance with a prior agreement to that effect, in consideration of her choses and moneys previously reduced to his possession; and he testified that both he and his wife supposed, at the time, the conveyance was valid, and sufficient to convey her the title, and he intended thereby to convey the legal title. More than a year after this conveyance, the order confirming the sale to McBain, under the execution in his favor against Daniels, was reversed and set aside, for the reason that the sale was for less than two thirds of the appraised value of the property: See *Daniels v. McBain*, 2 Ohio St. 406; but neither McBain or his wife had any actual notice, at the time of the conveyance, of the defects in the proceedings of sale by the sheriff, or of the intention of Daniels to claim the property, or to institute proceedings to reverse the order of confirmation. The plaintiff, sole heir of the wife of McBain, files her petition against him and Daniels, and others claiming as purchasers from Daniels, demanding a release and conveyance. Other facts appear in the opinion.

Kent and Newton, for the plaintiff.

M. R. and R. Waite, for the defendants.

By Court, WELCH, J. The plaintiff asserts that she has the equitable title to the lands in controversy, and asks a release from those having a legal title. The first inquiry is, Where is the legal title? Is it in McBain? or is it in Daniels and those claiming under him? In other words, did McBain acquire a good title by the sheriff's deed, made under an order of confirmation which was afterward reversed? Or if he did, was it defeated by the reversal before he made a legal conveyance to a third party?

The statute in force at the time was that of 1841: Swan's Stat. 474. It provides (section 12) that "no lands shall be sold for less than two thirds of the appraised and returned value of the inquest." Section 15 provides that "if the court shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity with the provisions of the statute, they shall direct the clerk to make an entry on the journal that the court are satisfied of the legality of such sale, and an order on the sheriff to make the purchaser a deed.

Before the passage of this act it had been held that in order to support a deed by the sheriff to a stranger it was necessary to show a judgment, levy, and sale, and that a good title would pass without any appraisement. It was, perhaps, to guard against the evils resulting from this power of the sheriff that the act of 1841 was passed. Since the date of that act it has been uniformly held that a confirmation is indispensable to the validity of the deed. Had the confirmation in this case remained in force, although upon its face erroneous, — the sale being made for less than half of the appraised value of the land, — and had the sale been made to a stranger instead of a party, no doubt a good title would have passed. But the confirmation, having been reversed and set aside, becomes a nullity, and the case stands, at least as to parties, as though no confirmation had ever been made. The deed was to a party, the sale was irregular and illegal, and there was no valid order of confirmation or for a deed, and no valid conveyance to a third party by the purchaser, and it seems to us clear that no title passed by the deed. The rule that a reversal of the judgment does not affect the title of the purchaser does not aid the case, because that rule applies only to a purchase by a stranger. And there seems also good ground for the distinction made by the counsel between the judgment and the confirmation, — that the former goes to the general authority of the officer to make a sale, while the latter is the evidence of the fact that the particular sale was legally made. The purchaser, when a stranger, has no control over the judgment, being no party to it; but he is a party to the sale, and ought to be held responsible to some extent for its regularity. It is enough here, however, to say that the purchaser was not only a party to the sale, but also a party to the suit, and that no legal rights had been acquired by third parties before the reversal.

We are equally unable to see how the proceeding in parti-

tion could have the effect to impart any title to McBain. "It is well settled," says this court, — *Tabler v. Wiseman*, 2 Ohio St. 211, — "that such a proceeding does not decide title or create any new title. It merely dissolves the tenancy in common, and leaves the title as it was, except to locate such rights as the parties may have in distinct portions of the premises, and to extinguish it in others."

It is claimed, however, that Daniels and those claiming under him are estopped by the proceeding in partition from setting up his title. It is sufficient answer to this claim to say that Daniels had no actual notice of the partition, and was not in fact a party to it otherwise than by publication of notice.

If, then, the legal title is not in McBain, but in Daniels and those claiming under him, it remains to inquire whether Mrs. McBain, and the plaintiff as her heir, have shown such a right in the premises as entitles them to the aid of a court of equity, to compel the conveyance of the legal title by Daniels and his grantees.

The case cannot be brought within the principle of *Taylor v. Boyd*, 8 Ohio, 353, because Mrs. McBain admittedly had no legal conveyance from her husband. She had, at most, only a contract for a conveyance. If the legal title was in her husband at the time of his attempted conveyance, it never passed to her. It is unnecessary, therefore, to decide what would have been her rights had the conveyance from her husband been a legal conveyance, or what would have been the effect of the reversal of the order of confirmation upon her title thus acquired.

We deem it also unnecessary to inquire what would be the rights of Mrs. McBain as between her and Daniels if she stood before us in the character of a purchaser for a valuable consideration without legal title. We think the evidence fails to show that she was such purchaser. Taking the whole testimony together, it seems to us that the attempted conveyance to her was voluntary. The money which was the alleged consideration of the intended conveyance had become the property of the husband in virtue of his marital rights. The mortgage debt had become his by the marriage, and the mortgage was thereby extinguished. The purchase-money of the Michigan farm had been reduced to his possession, and invested and used in the prosecution of his own business. The most you can say is, that he reduced the moneys and choses

of his wife to possession with the intention to compensate her therefor by the conveyance of the land in controversy. There was no contract to that effect, and the conveyance was therefore voluntary on his part.

The legal title, then, being in Daniels and his grantees, who set up the defense, and not in McBain, who makes no defense, and the plaintiff's mother having at most a mere equity, which she acquired as a volunteer, it seems clear that no conveyance should be decreed.

The petition is therefore dismissed, with costs.

BRINKERHOFF, C. J., and SCOTT, DAY, and WHITE, JJ., concurred.

JUDICIAL SALE, EFFECT OF CONFIRMATION: *Hutton v. Williams*, 76 Am. Dec. 297, and note 307; *Burns v. Hamilton*, 70 Id. 570, and note 579; purchaser acquires no title until confirmation: *Houston v. Aycock*, 73 Id. 131; effect of reversal of the decree under which the sale was made: *Gossom v. Donaldson*, 68 Id. 723; *Jesup v. City Bank*, 82 Id. 703.

ORDER CONFIRMING EXECUTION SALE ADJUDICATES MERELY that the proceedings of the officer, as they appear of record, are regular, and a direction to the sheriff to complete the sale: *Kochler v. Ball*, 83 Am. Dec. 451.

DECREE OF PARTITION VESTS TITLE SUFFICIENT TO MAINTAIN TRETTASS to try title, though the partition is invalid, when: *Grassmeyer v. Bessen*, 70 Am. Dec. 309.

EFFECT OF JUDGMENT IN PARTITION: See *Nicely v. Boyles*, 40 Am. Dec. 640, 642; *Nash v. Church*, 78 Id. 678.

THE PRINCIPAL CASE IS CITED to the first point stated in the *syllabus*, in *Insurance Company v. Sampson*, 38 Ohio St. 675. It is also cited in *Herakier v. Florence*, 39 Id. 525, where it is said that the rule asserted in the principal case applicable to partition proceedings under the statute, that no new title is created thereby, does not apply to the deliberate conveyances of the parties, especially where there is an independent consideration for such conveyances.

WALKER v. HALL.

[15 OHIO STATE, 255.]

CO-DEVISEE IS NOT ESTOPPED IN EQUITY TO CLAIM DOWER AGAINST HER CO-PARTITIONERS, where, at the time of the partition of the estate between the co-devisees, she had an inchoate right of dower in premises partitioned to another, which subsequently to the partition became perfect by the death of her husband. In such case equity will decree contribution by all the co-partitioners, thus making good to the co-devisees, in whose share the dower is assigned, their equal share in the common estate remaining after the assignment of dower.

THE opinion states the case.

James Pillars, for the plaintiff.

W. F. Stone and A. G. Thurman, for the defendants.

By Court, BRINKERHOFF, C. J. The plaintiff filed her petition in the common pleas of Seneca County, against Luther A. Hall and Cynthia Ann, his wife, for the assignment of dower in certain real estate situate in said county, and in the petition described, and for general relief. After judgment in the common pleas, the case was appealed to the district court, where it was reserved for decision in this court on the petition, answers, reply, and an agreed statement of facts.

Omitting matters of detail not material to the determination of the case, the facts, as they appear from the pleadings and the agreed statement, are substantially these:—

The plaintiff is the widow of Joseph Walker, the daughter of Josiah Hedges, deceased, and the sister of the defendant, Mrs. Hall. During her coverture with Joseph Walker, he at one time was seised in fee of the real estate in which she now claims dower. Under a judgment and execution against him this real estate was sold and conveyed by the sheriff; and the title acquired by the purchaser at sheriff's sale was, by subsequent sales and conveyances, finally vested in the plaintiff's father, Josiah Hedges; the plaintiff having never released her inchoate right of dower. And thus the title remained until the death of Josiah Hedges, who died testate, and whose will was admitted to probate in July, 1858. By this will, among many other things not material to the question before us, he devised a considerable real estate, including that in which dower is here claimed, equally (subject to deduction for advancements) among such of his children as were living and the heirs of such as were dead.

In April, 1859, Joseph Hall and his wife, the plaintiff here, joined with other devisees of Josiah Hedges in an action against Hall and wife and still other of the heirs and devisees of Josiah Hedges, for an account of advancements and the partition of the real estate devised to the parties in common.

Partition was had accordingly, the premises in which dower is here claimed being assigned to Mrs. Hall as her share. The partition as made by the commissioners and confirmed by the court was in accordance with an agreement amicably made among the parties to the partition; and neither in the will of Josiah Hedges nor in the proceedings for partition is there any mention or reference to the plaintiff's inchoate right of dower.

Afterward, in January, 1861, Joseph Walker died; and in March following, this petition was filed.

On this state of fact is the plaintiff entitled to dower? We think she is; subject, however, to the right of her sister, Mrs. Hall, to such a contribution by all parties, to make good the loss she sustains by reason of the plaintiff's assertion of her title to dower, as will be equivalent to a new partition. And we will briefly notice the considerations which have been urged against this conclusion:—

1. True, it is a well-settled doctrine of the law that “no one is permitted to claim under, and at the same time adverse to, a will. If the testator assumes to dispose of property belonging to the devisee or legatee, the latter, accepting the benefit, must also make good the testator's attempted disposition”: *White v. Brokaw*, 14 Ohio St. 339. And if it were apparent upon the face of the will of Josiah Hedges, or from the terms of the will taken in connection with surrounding circumstances, that he intended by his will to dispose of the premises in controversy here as if freed from the plaintiff's possibility of dower therein, she, claiming the benefits of the will, would, I suppose, be precluded from asserting her claim. But the devise under which all these parties claim is a general one; and there is nothing in the terms of the will to indicate that the testator intended to devise, in respect to these premises, any other title than that which he held, to wit, the fee-simple, subject to his daughter's possibility of dower therein.

2. The plaintiff's claim is not barred by the proceeding in partition regarded as an adjudication. It is not *res adjudicata*. That proceeding was throughout silent in respect to the plaintiff's inchoate right of dower, and very properly so; for she then had not only no estate, but no right capable of being asserted in action. What she had was a mere possibility, which might or might not subsequently ripen into something of value.

3. Is the plaintiff precluded from asserting her claim to dower in a portion of the lands partitioned among her and her co-devisees by the mutual warranty which the law implies as arising and subsisting *inter se* between parties to a partition so long as the privity of estate continues between them? This is a serious question, and one not free from difficulty. That such warranty, as a general rule, exists at common law, is clear from the old books. “If the purparty of one parcener

be evicted by a title paramount, the partition shall be defeated; for the partition imports a warranty and condition, in law, that the one shall enter upon the other and enjoy her part in parceny, if she be evicted, as long as the privity between them continues": Com. Dig., tit. Parcener, c. 13; Co. Lit. 173 b, and 174 a. "Applying this common-law duty of co-tenants to aid each other in protecting what had been a common estate, even after partition made, the law holds it incompatible with their duty toward each other for either to become the demandant in a suit to recover any portion of the land by a paramount title, and thus to place himself in antagonism to his co-tenants and their common warrantor." "And where partition has been made by law, each partitioner becomes a warrantor to all the others, to the extent of his share, so long as the privity of estate continues between them. And inasmuch as a warrantor cannot claim against his own warranty, no tenant after partition made can set up an adverse title to the portion of another for the purpose of ousting him from the part which has been parted off to him": 1 Washburn on Real Property, 431, 432; *Venable v. Beauchamp*, 8 Dana, 321 [28 Am. Dec. 74]; *Feather v. Strohoecker*, 3 Penr. & W. 505 [24 Am. Dec. 342]; *Jones v. Stanton*, 11 Mo. 433.

That these are the established general rules bearing upon the question under consideration must be admitted; and it is equally clear that when they are applied to the ordinary case of the acquisition by purchase of an independent, adverse, and paramount title by one co-tenant, and its assertion by him against another after partition, the operation of these rules is equitable and just. In such case, it is but just that the purchaser of the adverse title should be held to have purchased for the common benefit of all parties to the prior partition, and that his rights under such purchase should be limited to a claim for contribution against his late co-tenants to reimburse him for his expenditure for the coming benefit: 4 Kent's Com. 371, notes. And except the case of *Woodbridge v. Banning*, 14 Ohio St. 328, I have not been able to find a case in which any exception to the application of these general rules has been recognized. But the cases in which the doctrine of implied warranty between partitioners has been invoked and applied are few; and all of them present the simple case of a voluntary purchase (after partition made, and before eviction by adverse, paramount title) of an adverse and paramount title, and the attempt to assert such title against co-parti-

tioners. But this is not such a case. As in *Woodbridge v. Banning*, *supra*, this is a case in which, by the operation of law and the act of God, there has, subsequent to the partition, ripened, in favor of the demandant, a title which potentially existed in her at the time of the partition, but which was then inchoate and incapable of being asserted. In none of the other cases were the facts analogous to the facts in this; and the question as to whether the common-law doctrines of implied warranty between co-partitioners apply to a case of this kind did not in them arise. Moreover, it seems to me to be not unworthy of notice that the doctrines of implied warranty and consequent estoppel between co-partitioners originated at common law; and though based on considerations of natural equity, they were long applied only in proceedings at common law by writ of partition. That form of proceeding is now obsolete, and has never had a place in the practice of our courts, it being superseded by proceedings in equity, and under special statutes. And it seems to us that when the principles of the common law are, as here, invoked as guides to proceedings in equity, they ought to be applied only so far as the ends of justice will allow. The warranty under consideration is not a warranty in fact, but a warranty by implication of law only. The law raises the implication for the attainment of justice; and the implication should cease wherever its application will work injustice. To hold Mrs. Walker estopped to claim dower in this case by reason of an implied warranty would be unjust to her; but to award it to her in accordance with the provisions of our statute in respect to improvements made subsequent to alienation by the husband, and decreeing contribution by all the co-partitioners to recompense Mrs. Hall for the loss of her equal proportion of the estate, exclusive of the dower estate of Mrs. Walker, will do justice to all. And all the parties to the partition having been brought into this case, there will be a decree accordingly.

The case of *Woodbridge v. Banning*, 14 Ohio St. 328, before referred to, was closely analogous to this. There a partition was had between parties as heirs of Anthony Banning, deceased. Subsequently, a spoliated will of the common ancestor was established and admitted to probate. And in an action by a devisee under the will, who had been a party to the proceeding in partition, to recover lands which the partition had assigned to other parties, he was held not to be

estopped by the proceedings in partition. I think I am not mistaken in saying, however, that in that case the common-law doctrine of implied warranty between co-partitioners escaped the attention of the court. Had it been otherwise, the reasons given for the decision would probably have been modified, but the decision would have been the same.

Decree for plaintiff.

SCOTT, DAY, WHITE, and WELCH, JJ., concurred.

PARTITION OF LANDS HELD IN CO-TENANCY DIVESTS DOWER RIGHT: *Wesson v. Gregg*, 67 Am. Dec. 355; and see *Lee v. Lindell*, 64 Id. 282.

INCIDENTAL RIGHT OF DOWER ONCE VESTED IN WIFE CANNOT BE DIVESTED except by her own voluntary act, performed in the mode prescribed by law: *Nicoll v. Ogden*, 81 Am. Dec. 311.

WHEN WIDOW IS ESTOPPED FROM SETTING UP CLAIM OF DOWER against purchaser: *Wiesman v. Macy*, 83 Am. Dec. 316.

DIXON v. CALDWELL.

[15 OHIO STATE, 412.]

PURCHASER OF LAND-WARRANT IN GOOD FAITH AND FOR VALUE CANNOT, AFTER HE HAS LOCATED WARRANT and obtained a patent for the land located, be charged in equity as trustee of the legal title for the true owner of the warrant, although it was obtained by the fraud of a third person, and transferred under a forged assignment.

MEASURE OF DAMAGES FOR CONVERSION OF LAND-WARRANT is its value at the time of the conversion.

ERROR to the district court of Ross County. A land-warrant owned by Caldwell, the defendant in error, was fraudulently obtained from him, and replaced by a forged warrant. Without his knowledge or consent, the genuine warrant was sold and assigned to Dixon, the plaintiff in error, by the person who falsely personated Caldwell, and forged his name. Dixon, having bought the warrant in good faith, for value, without notice of the fraud, or of the forgery, proceeded to locate the warrant, and obtained a patent for the land located. Caldwell then sought to charge Dixon, as his trustee, for the land so located, and in the court of common pleas he was adjudged to be such trustee. This judgment was affirmed by the district court, and it is now sought to reverse the judgment of affirmance.

W. H. Safford, for the plaintiff in error.

Alfred Yapple, for the defendant in error.

By Court, WHITE, J. The distinction between legal and equitable rights exists in the subjects to which they relate, and is not affected by the form or mode of procedure that may be prescribed for their enforcement. The code abolished the distinction between actions at law and suits in equity, and substituted in their place one form of action; yet the rights and liabilities of parties, legal and equitable, as distinguished from the mode of procedure, remain the same since as before the adoption of the code. Dixon, the defendant below, is the legal owner of the land in controversy, as patentee. This is conceded by Caldwell, the plaintiff below, but he claims to be the equitable owner, and that Dixon is his trustee, and as such, in equity, bound to account for the proceeds of the portion of the land sold, and surrender the remainder.

There is no pretense of an express trust; nor is it claimed that the defendant acquired the property in fraud or by other unfair means. The property, therefore, having been fairly acquired, before a constructive trust can be raised in equity, and fastened upon the defendant, so as to convert him into a trustee for the plaintiff, the circumstances of the transaction must appear to be such that it would be violating some principle of equity to allow the defendant to retain the legal title to the land for his own benefit.

The controversy here is not solely in regard to the land warrant. The legal title to that was clearly vested in the plaintiff, and for its conversion he has a plain legal remedy against the defendant for its value; and before it was lost in entering the land, for its recovery in specie.

The question is, whether, in the light of equity, the measure of legal relief is to be regarded as inadequate, and the defendant required, by a court of equity, to surrender the land to which he acquired the legal title in good faith, and, as he supposed, for his own benefit, by the combined use of the warrant and his own means, industry, and enterprise.

The defendant claims to be a *bona fide* purchaser of the land in controversy for value, without notice of the plaintiff's rights; and relies for his defense upon the rules of equity for the protection of such purchasers.

The land warrant in question was assignable in law, was in the possession and apparent ownership of the vendor, and the assignment was regular in form. The defect in the vendor's title was not apparent, and there was no reasonable ground for suspicion that the assignment had been forged. The de-

fendant purchased and paid full value for the warrant, and is not chargeable with a want of reasonable diligence in so doing. Having no reason to suspect the existence of the plaintiff's title to the warrant, he was, in equity and good conscience, chargeable with no duty toward him in relation to its future use. If he withheld it from entry he would have been liable to return it to the plaintiff or pay him its value. The good faith of his purchase would have been no answer to the plaintiff's legal demand. After the location of the warrant, the holder of the legal title thereof acquired an equity in the land upon which the location was made; and before the defendant clothed himself with the legal title, and while the equities were open between the parties, Caldwell's equity, being older in time, would have been better in right. But Dixon, unaffected with fraud or notice, and upon a valuable consideration paid, having obtained the legal title to the land in controversy, brings himself within the protection awarded in equity to the holder of the legal estate.

A court of equity, says Sugden, in his treatise on vendors, vol. 3, p. 417, acts upon the conscience, and as it is impossible to attach any demand upon the conscience of a man who has purchased for a valuable consideration *bona fide* and without notice of any claim on the estate, such a man is entitled to the peculiar favor and protection of a court of equity.

Where a court of equity cannot deal directly with the thing which is the subject-matter in controversy, but has to reach it through the consciences of the parties, its jurisdiction is necessarily limited to enforcing the fulfillment of their equitable obligations, and cannot extend to compelling the relinquishment of any right or the abandonment of any interest which can be retained consistently with equity and good conscience.

This principle applies especially where the aid of a court of chancery is sought to enforce the surrender of an estate in land. As in such case the court can only act on the land through the medium of the parties, it must first inquire whether the party against whom its assistance is sought is conscientiously bound to comply with the demand urged against him, for if he be not, the case will fall without the scope of a jurisdiction which is founded upon the obligations of conscience: See notes of the American editor to *Basset v. Nosworthy*, 2 Lead. Cas. Eq. 67, 68, and the authorities there cited; Mitford Eq. Pl. 135; *Cottrell v. Hughes*, 29 Eng. L. & Eq. 358; S. C.,

80 Eng. Com. L. 558; *Wallwyn v. Lee*, 9 Ves. Jr. 25; *Gibler v. Trimble*, 14 Ohio, 340.

In *Jones v. Powles*, 3 Mylne & K. 581, the equitable title of the purchaser, who had got in the legal estate, depended upon a forged will, and he was held entitled to the protection of the court. In this case a person advanced money upon the mortgage of an estate, which the mortgagor claimed under a will which ultimately turned out to be forged, and got a conveyance of the legal estate, which was outstanding in a mortgagee whose debt had been satisfied. On a bill filed by the heiress at law, it was held by Sir John Leach, M. R., that the mortgagee, being a purchaser without notice of the plaintiff's title, could protect herself by the legal estate. The court observed that its impression at the opening of the case was, that the protection of the legal estate extended only to cases where the title of the purchaser for valuable consideration without notice was impeached by reason of some secret act or matter done by the vendor, or those under whom he claimed; but upon full consideration of all the authorities and the *dicta* of judges and text-writers, and the principles upon which the rule is grounded, the court was of opinion that the protection of the legal estate was to be extended, not merely to cases in which the title of the purchaser for valuable consideration without notice is impeached by reason of some secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims, where such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected by reasonable diligence: 2 Lead. Cas. Eq. 7. This case is approved by Mr. Sugden in his treatise already cited, page 417, and is founded upon clear principles of equity, although they would not here be applicable to the case of a satisfied mortgage.

It is not deemed necessary to examine in detail in this opinion the authorities relied on by the counsel of the defendant in error. Where the benefit of the rule has been denied, the party was found to be affected with notice; and as we have already stated, it is indispensable for the party holding the legal title, and seeking protection in equity, to show that he is a purchaser for a valuable consideration, that his purchase was in all respects fair and free from every kind of fraud, and that at the time of his purchase he was not chargeable with notice of the adverse claim.

The conclusion, therefore, at which we have arrived is, that Dixon cannot be required to surrender the legal title of the unsold land to the plaintiff below, nor to account for the proceeds of the part sold, and that the court erred in requiring him to do so. But as before stated, he is under a clear legal liability for the value of the warrant. The judgment of the district court, and of the court of common pleas, is therefore reversed, and the cause remanded to the common pleas for further proceedings.

BRINKERHOFF, C. J., and SCOTT, DAY, and WELCH, JJ., concurred.

PATENT IS HIGHEST EVIDENCE OF TITLE, and can be impeached only on the ground of fraud or mistake: *Carter v. Spencer*, 34 Am. Dec. 106; and see *Hit-tub-ho-mi v. Watts*, 45 Id. 308; and the fraud or irregularity must appear upon the face of the patent to invalidate it: *State v. Bachelder*, 80 Id. 410.

ONE WHO OBTAINS PATENT TO LAND BY FRAUD TOWARDS ANOTHER holds the title thus acquired for the benefit of those who have been injured by his conduct: *Grove v. Fulsome*, 57 Am. Dec. 247.

THE PRINCIPAL CASE IS CITED to the point that one who acquires a land warrant by assignment, and is not chargeable with notice nor want of diligence in regard to the rights of the true owner, holds a clear title to the land under the patent, in *Mack v. Brammer*, 28 Ohio St. 514; and is cited to the point that the rights of parties remain unaffected by the provisions of the code of civil procedure, in *Williams v. Englebrecht*, 37 Ohio St. 387.

MERCHANTS' AND MANUFACTURERS' INSURANCE COMPANY v. SHILLITO.

[15 OHIO STATE, 552.]

NEW TRIAL ON GROUND OF ERRONEOUS JUDGMENT — REVIEW. — Final judgment was rendered for the defendant upon a special finding of facts by the court in which the case was tried. On the plaintiff's petition in error the reviewing court reversed the judgment, and granted a new trial. *Held*, that the order granting a new trial was proper, and the supreme court would not review the evidence.

LOSS OF GOODS JETTISONED ON VOYAGE IS COVERED BY MARINE POLICY specifying the goods, and made with reference to a particular trade or line of steamers, the goods being on deck for carriage, in accordance with an established usage of such trade or line.

ERROR to the superior court of Cincinnati. The action in the court below was brought by the defendant in error against the plaintiff in error on an open policy of insurance, to recover for the loss of goods jettisoned on voyage. The goods were specified in the policy, the insurance company "beginning the

adventure upon said property from and after the lading thereof, and to continue until landed at the port of destination"; and the perils insured against were those "of the seas, rivers, fire, jettison, and pirates." The court found as facts, that the property so insured was shipped from Cincinnati to Wheeling by steamboat, thence carried to Baltimore by railroad, and thence shipped to New York by a steamboat of the Parker Vein line; that said property was stowed on the deck of the said steamboat at Baltimore by the persons controlling shipments for the line, and that on the voyage from Baltimore to New York, on account of storms, and for the safety of the vessel and the residue of the cargo, all the said property was jettisoned, and thereby lost; that the plaintiff was the sole owner of said property, and that the quantity lost was of greater value than the amount insured upon it; that the plaintiff notified the defendant of such loss, made all necessary proofs, and duly demanded payment, which the defendant refused. The court further found that at the time of the said insurance it was and had been for some years previously the usage of the Parker Vein line to stow property of the description shipped by the plaintiff, and insured by the defendant, upon the deck, or under deck, as the one or the other happened to be more convenient in the estimation of the master of the vessel. The defendant filed a motion to set aside the court's finding of facts, and asked for a rehearing, which motion was overruled. The court found as matter of law that the plaintiff was not entitled to recover, and rendered judgment against him; thereupon the plaintiff filed his petition in error in the superior court at general term to reverse said judgment, which was reversed accordingly, and the cause remanded to the special term for a new trial. The insurance company now seeks to reverse the judgment of the superior court at general term. Other facts appear in the opinion.

Thomas G. Mitchell, for the plaintiff in error.

R. M. Corwine and George E. Pugh, for the defendant in error.

By Court, DAY, J. It is sought to reverse the judgment of the superior court at general term for two reasons: 1. That the evidence did not warrant the findings of fact as shown by the record; 2. That the plaintiff below was not in law entitled

to recover upon either the evidence or facts as found by the court.

The court, in special term, rendered judgment against the plaintiff below upon the facts as found by the court; and by his petition in error he questioned only the law as held upon the facts so found. Neither party was, in the court at general term, complaining of the findings of fact at special term; nor are either in this court, so far as the record shows, alleging any error of that kind. The only question directly presented by the record is one of law upon the facts as found.

It is difficult to see upon what principle this court can, as the record stands, review the evidence, and—granting that the judgment in special term was unwarranted by the facts as found—proceed to what would be equivalent to a new finding of facts that would sustain the judgment. It cannot be said that such a course would not be to the prejudice of the plaintiff below; for had the findings been as desired of this court, he might have availed himself of his statutory rights for a new trial; and the findings being what they were, he had the right to rest, as the remedies impeaching the findings available to the other party could, at most, result only in a new trial.

The superior court at general term, holding the judgment in special term to be erroneous upon the facts as found, might properly look at the evidence upon which they were found, for the purpose of determining whether it would proceed to render the proper judgment upon the facts as found,—as it doubtless might have done,—or, instead thereof, grant a new trial. Conceding that the facts found by the court at special term were unwarranted by the evidence, the most that the insurance company could have asked of that court was a new trial; and surely it could ask no more at general term, upon the mere question of erroneous findings on the evidence.

For another reason, it would seem, the plaintiff is not entitled to a review of the evidence to impeach the findings of the court below; for it has long been held that a motion for a new trial must be filed and overruled below before that can be done. It is true that the defendant below moved to set aside the findings and for a rehearing. This motion may fairly be construed as asking leave only for a reargument upon the evidence then before the court, and not for a new trial; but if it be regarded as a motion for a new trial, it has been granted in general term; and thus the findings complained

of have been set aside, and the plaintiff in error is no longer prejudiced by the ruling on the motion in special term.

The holding of this court in the cases of *Spafford v. Bradley*, 20 Ohio, 74; and *Beatty v. Hatcher*, 13 Ohio St. 115, on this point, are clear and decisive against the plaintiff in error.

Did the superior court at general term err in reversing the judgment rendered at special term in favor of the defendant below upon the facts as found by the court?

This is the main proposition affecting the substantial rights of the parties, and its determination is not without difficulty. The authorities upon some of the questions involved in its solution are not entirely harmonious. General principles are, however, settled by them, upon which, as well as upon authority, this case may be satisfactorily determined.

The goods mentioned in the policy were stowed on deck, and jettisoned on the voyage. The terms of the policy are broad enough to cover the loss. But it is claimed goods carried on deck are not ordinarily protected. Undoubtedly, such has long been the general rule; and it is equally clear that its origin was based upon a general usage not to carry goods on deck. This rule of marine insurance is the result of a general principle of mercantile law, applicable to any contract made with reference to a known usage, that the custom to which it relates becomes a part of the contract: Arnould on Insurance, sec. 42, and numerous authorities cited in Perkins's edition; 1 Phillips on Insurance, sec. 133; *Renner v. Bank of Columbia*, 9 Wheat. 581.

It follows that policies are to be construed with reference to the usages to which they relate: Arnould on Insurance, sec. 41; Phillips on Insurance, sec. 132.

These principles tend to harmonize the course of decisions, and their apparent confusion may be found to rest more in the changing usages of navigation and trade than in any lack of certainty or stability in the principles of law.

The general rule before referred to was based on the usages adopted in the navigation of ordinary sailing vessels; and the reason assigned for the usage not to stow goods on deck, and the rule founded thereon, is, that goods so carried are exposed to greater peril, and enhance the difficulties of navigation, and consequent danger to the ship and cargo. How far a rule of law based upon a usage of ordinary sailing craft may be applicable to or binding upon vessels propelled and governed by steam is worthy of consideration. If the latter are so con-

structed and governed that the reason for the usage of the former fails, and the usage ceases, it would seem that the general rule should be so far modified as to make that class of vessels an exception. However that may be, it cannot be doubted that, upon principle, where the mode of navigation, or the custom of a particular trade, is such that no usage of the kind, upon which the general rule is based, obtains, and that is within the knowledge of the parties, their contracts made in relation to such navigation or trade are presumed to be made with reference thereto, and are not modified by a usage that has no connection with the subject-matter of the contract. Nor would this be inconsistent with the general rule as stated by the American editor of the exchequer reports in a recent note to *Miller v. Tetherington*, 6 Hurl. & N. 288, based upon numerous American authorities cited, that: "In the absence of any contract, express or implied, from some particular custom of trade or navigation, it is settled that the loss or jettison of goods carried on deck creates no claim upon insurers or for general average on the rest of the cargo." Mr. Phillips, in his treatise, makes substantially the same statement of the rule: Sec. 460.

But the chief difficulties upon which the authorities most differ arise where the policy merely names the article, and it is such as is sometimes carried on deck, and sometimes under, and as to the extent, proof is admissible in relation to particular usages, or the character and extent thereof.

In analogy to the general principles before referred to, it would seem that if the goods covered by the policy are to be carried on a vessel so constructed, propelled, and managed, that goods may be as properly and safely stowed above as below deck; or if the description of the voyage or character of the goods be such that the underwriter may be presumed to be apprised of a usage to carry them either upon or under deck, the policy will attach to them when so carried. This proposition is substantially what Mr. Phillips, in the section before cited, amidst conflicting authorities, considered to be the result of established principles; and the later decisions support and tend to settle that as the correct rule of law.

A leading English case is that of *Da Costa v. Edmunds*, 4 Camp. 142. It was a suit on a policy covering "forty carboys of vitriol," from London to Lisbon. "These carboys were placed on the deck, and carefully lashed to the ship's side. A storm arose during the voyage, and a heavy sea having

broken several of the carboys, the vitriol caught fire, and for the preservation of the ship, it was necessary to throw the whole overboard. The ship and the rest of the cargo arrived safe at Lisbon. It appeared that carboys of vitriol are very frequently carried on the decks of ships, but that it is likewise usual to stow them below, bedded in sand, in which situation they are considered safer. Lord Ellenborough left it to the jury to say whether it was usual to carry vitriol on the deck, and whether these carboys were properly stowed. If there was a usage to carry vitriol on deck, the underwriters were bound to take notice of it without any communication, and all they could require was that these carboys should be properly stowed in the usual manner. On the other hand, they were not liable if the goods were carried on the deck without such a usage, or if they were not stowed there in a skillful and proper manner. The jury found for the plaintiff, and the court, in the ensuing term, refused a rule to show cause why there should not be a new trial."

The same principle is recognized in the case of *Gould v. Oliver*, 4 Bing. N. C. 134.

Hurley v. Milward, 1 Jones & C. 224, in the court of exchequer for Ireland, at Easter term, 1839, was an action for general average, against the owner of a steam vessel, by the owner of certain pigs which had been thrown overboard in a storm. "It appeared in evidence that the plaintiff had, in February, 1838, shipped on board the Kilkenny steamer 234 pigs, to be conveyed from Waterford to Bristol; that there was not room for them below, and that they were therefore stowed upon the deck; that pigs were sometimes carried on the deck, and at other times below, under the hatches, according to the captain's orders; that the captain regulated the situation of the pigs; and that the charge for freight in either case was the same. The custom was to ship on deck, or below, according to the captain's directions." In answer to an assertion of the defendant's counsel, that "according to every maritime code in Europe, property stowed upon deck is not the subject of general average," Mr. Baron Pennefeather said: "That is a proposition laid down with respect to sailing vessels. The reason of it is, that goods stowed on deck obstruct the mariners in the navigation of the vessel. In a steam vessel, plying from port to port, that reason does not apply. Those vessels are fitted up for a peculiar description of trade, and carry a large portion of their cargo on deck; and the evidence is, that the cargo is stowed according to the directions of the captain."

The owners of the Kilkenny steamer mentioned in the case of *Hurley v. Milward*, 1 Jones & C. 224, before cited, brought an action against the insurers of the hull, stores, and machinery to recover their share of the loss of the pigs which they had contributed to general average. The defendant pleaded that the pigs had been placed on deck, and a custom to carry them on deck was replied, to which the defendant demurred. Lord Denman delivered the opinion in 1842, and affirmed the doctrine of *Da Costa v. Edmunds*, 4 Camp. 142, and *Gould v. Oliver*, 4 Bing. N. C. 184. He says: "We have already shown that the law of England has stopped very short of the doctrine that no owner of goods stowed on deck shall under any circumstances be allowed to recover contribution on general average. The question between the merchant and ship-owner may be different from that between either of them and the underwriters; because the former may agree to stow the goods in such a manner that the latter will not be at all responsible for their loss. But it seems to the court, for the reasons assigned, that the mere fact of stowing them on deck will not relieve the underwriter from responsibility; inasmuch as they may be placed there according to the usage of the trade, and so as not to impede the navigation or in any way increase the risk": *Milward v. Hibbert*, 3 Q. B. 120; 2 Gale & D. 142.

This case, as well as that of *Gould v. Oliver*, 4 Bing. N. C. 184, is referred to and approved in a case decided in the superior court of the city of New York, in 1859; and although not a court of last resort, is one of necessity familiar with commercial questions. Upon a full consideration in general term it held: "That jettisoned goods carried on deck, according to the custom of the trade, by steamboats navigating the sound that separates Long Island from the mainland of New York and Connecticut, and stowed in the usual way, are entitled to contribution for general average loss." In the opinion delivered by Judge Pierrepont it is said that "that the old rule was established when all vessels were propelled by sails, and when there was no machinery in the hold of the ship; but the introduction of steam into marine service has wrought great changes in the situation of the motive power, and has rendered the steamboat deck the fitter place for the stowage of cargo. The reason of the rule has ceased, and the rule should perish with the reason": *Harris v. Moody*, 4 Bosw. 210.

The case of *Gillett v. Ellis*, 11 Ill. 579, is another case in which the same principles are recognized. It was decided in

1850, and was brought to recover (on one count) of the owners of the boat their general average of jettisoned goods. The vessel was a propeller, and the goods were stowed between the hatches on the main deck. The chief justice, in the opinion, says that "propellers are double-decked vessels, and goods placed between the main and hurricane decks are considered as safe as those stowed in the hold,—are, in fact, regarded as under hatches. It is the general custom on the lakes, in reference to this class of vessels, to stow the cargo indiscriminately in the hold and on the main deck, as best suits the convenience of the master. In this respect no distinction is made in the rates of carriage and insurance. It is insisted that the plaintiff cannot claim contribution, because his goods were stowed on the deck of the vessel. The general rule undoubtedly is, that he is not entitled to the benefit of a general average. The cargo on deck of a ship, from its situation, increases the difficulty of navigating the ship, and is no more exposed to peril than that which is under cover; and if swept away or cast overboard, the owner must bear the loss without contribution from the owners of the vessel and the cargo under hatches. But this case does not fall within the general rule. Propellers are a class of vessels but recently introduced in the navigation of the lakes, to which, from the peculiarity of their construction, and the general usage respecting them, the general rule is not applicable. The universal usage resulting from the character of the vessel must govern the rights and liabilities of the owners of the vessels and cargo. The owner of goods which are stowed on the main deck of a propeller, and necessarily cast overboard by the direction of the master to preserve the vessel and crew, is therefore entitled to the benefit of general average as much as the owner of goods that are stowed in the hold would be under like circumstances."

The court in the case of *Toledo Ins. Co. v. Speares*, 16 Ind. 52, while it recognizes the general rule on this subject, as fully adheres to the exception, and adopts a quotation from Arnould on Insurance, viz.: "But the most important exception is that of goods carried on deck, which are not contributed for, if jettisoned, unless they are so carried according to common usage and the course of trade, on the voyage for which they were shipped. On proof of such usage they are contributed for, if jettisoned, like other goods; and no notice to the underwriters of the existence of such custom is necessary in order to make them liable, they being bound to know the usage of

the particular trade"; and the following authorities are cited, viz.: Abbott on Shipping, 6th Am. ed., 481 et seq., and notes; *Brown v. Cornwell*, 1 Root, 60; *Milward v. Hibbert*, 43 Eng. Com. L. 659; 2 Arnould on Insurance, 888-890, and cases there cited. It will be seen that *Milward v. Hibbert* is again cited as a leading case.

The holding in the case just cited from the Indiana reports, that the underwriter is presumed to have notice of the usages of the trade in reference to which he contracts, is supported by authority both English and American.

Lord Mansfield, in the case of *Pelly v. Royal Ex. Ass. Co.*, 1 Burr. 341, says: "The insurer, in estimating the price at which he is willing to indemnify the trader against all risks, must have under consideration the nature of the voyage to be performed, and usual course and manner of doing it. Everything done in the usual course must have been foreseen and in contemplation at the time he engaged."

Again, in *Noble v. Kennoway*, 2 Doug. 510, he says: "Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that whether it is recently established or not. If he does not know it, he ought to inform himself."

In the case of *Macy v. Whaling Ins. Co.*, 9 Met. 354, in the opinion, the language of Mr. Starkie (2 Stark. Ev. 361, 362) is adopted, viz.: "In an action on a policy of insurance, evidence is admissible to show the custom of a particular branch of trade; for every insurer is presumed to be acquainted with the practice of the trade in which he insures, although it has been but recently established."

Although this doctrine would seem to be well founded in reason and on authority, it is, nevertheless, unnecessary for us to determine, in this case, whether it is the true rule; for, upon the facts as found by the court below, it may be fairly presumed that the policy was made with reference to the line of steamers on which the goods specified in the policy were to be carried; and that the insurance company had, or by the exercise of ordinary prudence might have had, notice of the usages of that particular trade. It follows, therefore, upon the principles above stated, that the policy, made with reference to that trade, embraces the established usages thereof, and that goods carried on deck in accordance with such usage, and jettisoned on the voyage, are within the provisions of the policy, and that the company are liable thereon for the loss.

Judgment of the superior court in general term affirmed.

BRINKERHOFF, C. J., and SCOTT, WHITE, and WELCH, JJ., concurred.

WHAT LOSSES ARE OR ARE NOT WITHIN MARINE POLICY OF INSURANCE: See *Atwood v. Reliance Transp. Co.*, 34 Am. Dec. 503; *Flemming v. Marine Ins. Co.*, 33 Id. 83; *Dupeyre v. Western etc. Ins. Co.*, 38 Id. 218; *Lake v. Columbus Ins. Co.*, 42 Id. 188; *Rugeley v. Sun Mut. Ins. Co.*, 56 Id. 603; *Van Horn v. Taylor*, 41 Id. 279, and note on "perils of the sea," 281; *Salisbury v. Mar. Ins. Co.*, 66 Id. 687; *Heebner v. Eagle Ins. Co.*, 69 Id. 308.

USAGES AS AFFECTING CONSTRUCTION of contract of insurance: *Oss v. Charleston etc. Ins. Co.*, 45 Am. Dec. 771; *Natches Ins. Co. v. Stanton*, 41 Id. 592; *Walsh v. Homer*, 45 Id. 342, and note 352; *Grant v. Lexington Ins. Co.*, 61 Id. 74; *Whitmarsh v. Conway etc. Ins. Co.*, 77 Id. 414.

WHETHER MARINE POLICY COVERS LOSS OF GOODS STOWED ON DECK AND JETTISONED. — This question is closely connected with that of contribution, where goods are jettisoned from a ship. The term "jettison," in its ordinary sense, means a throwing overboard for the preservation of the ship and cargo, and is usually treated of in this sense under the head of general average: *Butler v. Wildman*, 3 Barn. & Ald. 398, 402; and see *Insurance Co. v. Bland*, 9 Dana, 147; *Winick v. Holmes*, 25 Pa. St. 371. And it has long been a well-settled principle of maritime law, that if goods are necessarily thrown overboard for the purpose of saving the ship, freight, and cargo, the loss is to be made good by the contribution of all, because it was incurred for the benefit of all: *Toledo etc. Ins. Co. v. Speares*, 16 Ind. 52; *Wood v. Phoenix Ins. Co.*, 14 Phila. 545; S. C., 12 Rep. 231. But the owner of goods shipped on deck, and lost by jettison, was excluded from this right to contribution, on the ground that such loading was improper, as tending to embarrass the movements of the crew and the working of the ship: *Smith v. Wright*, 1 Caines, 43; S. C., 2 Am. Dec. 162; *Cram v. Aiken*, 13 Me. 229; *Lenox v. Un. Ins. Co.*, 3 Johns. Cas. 178. And in England, until the year 1837, goods carried on deck were, under all circumstances, excluded from the benefit of contribution. But in a series of decisions commenced in that year, exceptions were established in favor of goods carried on deck in pursuance of custom, and in favor of goods carried on the decks of steam vessels generally: *Gould v. Oliver*, 4 Bing. N. C. 140; *Hurley v. Milward*, 1 Jones & C. 224; *Milward v. Hubbard*, 3 Q. B. 121; and a further exception was allowed, against the vessel and its owners, where the cargo is carried on deck by agreement between the owner of the cargo and the vessel: *Johnson v. Chapman*, 19 Com. B., N. S., 563. And see generally, on the subject of general average contribution where deck cargo is jettisoned, *Wright v. Marwood*, L. R. 7 Q. B. D. 62; *Burton v. English*, L. R. 12 Id. 218; reversing S. C., 10 Id. 426. In this country, the tendency of the courts is to recognize and adopt these exceptions, as appears in the principal case and the cases there cited. It is said that the old rule was established when all vessels were propelled by sails, and when there was no machinery in the hold of the ship. But when steam was applied to the uses of navigation, it was found that cargoes could be carried on the decks of vessels thus propelled with entire safety; and the reason of the rule having ceased, the rule should perish with the reason: *Harris v. Moody*, 4 Bosw. 210; S. C. affirmed, 30 N. Y. 266; reported also in this volume, *ante*, p. 375. So the rule that the jettison of goods carried on deck according to common usage and the course of

trade, on the voyage for which they are shipped, gives a claim for contribution has been repeatedly asserted and applied: See *Meaker v. Lufkin*, 21 Tex. 383; *Star of Hope*, 17 Wall. 651; *Hasleton v. Manhattan Life Ins. Co.*, 11 Biss. 210; S. C., 13 Rep. 741; 12 Fed. Rep. 159; *Wood v. Phoenix Ins. Co.*, 12 Rep. 231; S. C., 14 Phila. 545; *The Hettie Ellis*, 20 Fed. Rep. 507 (Cir. Ct. Lp.). Compare *The Milwaukee Belle*, 2 Biss. 197; *Lawrence v. Minturn*, 17 How. 100.

Every underwriter is presumed to be acquainted with the practice of the trade he insures: *Noble v. Kennoway*, 2 Doug. 513. And where a general usage exists to carry goods on deck, underwriters who are doing business in the particular trade must take notice of it, and their contracts are to be construed with reference to that usage: *Orient etc. Ins. Co. v. Reymershoffer*, 56 Tex. 234, 238; and see *Hearne v. Mar. Ins. Co.*, 20 Wall. 488; *Astor v. Union Ins. Co.*, 7 Cow. 202; *Macy v. Whaling Ins. Co.*, 9 Met. 354, 363; *Howard v. Great West. Ins. Co.*, 109 Mass. 384, 387. It is held that a policy on property in general terms, "laden or to be laden on board," would not cover property laden upon deck. But if the goods are named, and are such as are usually carried on deck in the particular trade, for any satisfactory reasons, this will be presumed to have been known to persons doing an insurance business in the particular trade, and to have been contemplated by the parties to the insurance contract; and it will bind the parties the same as though the policy contained an express stipulation that the property should be stowed and carried on deck: *Orient etc. Ins. Co. v. Reymershoffer*, 56 Tex. 234; compare *Taunton Copper Co. v. Insurance Co.*, 22 Pick. 108; 1 Phillips on Insurance, 238, citing the principal case. If the policy provides for a customary loading on deck, and then adds that the consent of the insurer must be had to cover goods put on deck, the fair construction of the contract is, that the clause refers to the loading of other goods than those placed on deck under the custom: *Allen v. St. Louis Ins. Co.*, 12 Rep. 54; S. C., 85 N. Y. 473; this is in accordance with the rule that in case of a seeming inconsistency between two provisions of a policy of insurance, it is the duty of the court so to construe them as, if possible, to give effect to them both in accordance with the intention of the parties, and if the meaning is ambiguous, that meaning is to be given which is most favorable to the insured: *Id.*; *Rawn v. Home Ins. Co.*, 59 N. Y. 387; *McMaster v. Insurance Co. of N. A.*, 55 Id. 222. The insurer of the hull of a vessel was held liable to contribute to general average for the jettison of the deck load, it being the custom or usage of the trade in which the vessel was employed to carry part of the cargo on deck: *Hasleton v. Manhattan Life Ins. Co.*, 11 Biss. 210; S. C., 12 Fed. Rep. 159; 13 Rep. 741; and a clause in the policy providing that adjustments for losses shall be subject to the usages and regulations of the port of New York was construed as having reference only to the manner of making the adjustment, and that it did not control the question of the extent of the liability of the underwriter, although it appeared that by the usage of that port no general average can be claimed for jettison of a deck load: *Id.* But according to the custom of trade by steamboats navigating the sound separating Long Island from the mainland of New York and Connecticut, jettisoned goods, carried on deck and stowed in the usual way, are entitled to contribution for general average loss: *Harris v. Moody*, 4 Bosw. 210; S. C. affirmed, 30 N. Y. 266; reported also in this volume, *ante*, p. 375.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

BARNETT'S APPEAL.

[46 PENNSYLVANIA STATE, 892.]

ACTIVE OPERATIVE TRUST IS CREATED AND ESTATE VESTED IN TRUSTEES by devise of real and personal property, in trust, to lease and let the real estate, to keep the personal estate invested on bond and mortgage, or other safe security, to collect and receive the rents, interest, and profits thereof, and to pay over the net income to the children of the testator; the uses not being such as are executed by the statute of uses, nor by the common law of Pennsylvania.

TRUST RESTRICTED TO LIVES IN BEING AT DEATH OF TESTATOR, or to the survivor of them, does not infringe the rule against perpetuities.

LAW CONCERNING ACTIVE TRUSTS discussed.

APPEAL from an order of the orphans' court confirming the report of an auditor, wherein he decided that the trust mentioned in the opinion was no trust at all, but that by the terms of the devise the beneficiaries each took an estate-tail.

Andrew Miller and J. Hill Martin, for the appellant.

W. J. McElroy, for the appellee.

By Court, READ, J. Trusts have been divided into passive or technical and active or operative trusts, with the nature and extent of the latter of which classes it is our present purpose to deal. Amongst the active trusts has always been classed that to receive and pay over the profits to another, in which case the land must remain in the trustee, to enable him to perform the trust. So where it is the testator's intention, or where it is necessary for the accomplishment of any object of his will, that the legal estate or possession of the land should

remain in the trustee for the purpose of administering the trust. So, also, where the trustee is to dispose of the property, or pay the rents over to the *cestui que trust*, or apply them to his maintenance, or to make repairs, or to pay annuities, or to manage with the estate as he should think most for the interest of the *cestui que trust*, or to pay the rents to a married woman, or suffer her to receive them.

In all these cases, the legal estate does not vest in the *cestui que trust*, and the use is not executed by the statute in him. This was not only received as law in Pennsylvania, but in some instances greater restrictions were placed on *cestuis que trust* than were allowed in England. In *Lancaster v. Dolan*, 1 Rawle, 231 [18 Am. Dec. 626], it was held that a *feme covert* is, in respect to her separate estate, to be deemed a *feme sole* only to the extent of the power clearly given by the instrument by which the estate is settled, and has no right of disposition beyond it; which was reaffirmed in *Pullen v. Rianhard*, 1 Whart. 520, *Thomas v. Folwell*, 2 Id. 11, *Dorrance v. Scott*, 3 Id. 316 [31 Am. Dec. 509], *Lyne v. Crouse*, 1 Pa. St. 111, *Rogers v. Smith*, 4 Id. 93, *Pennsylvania Ins. Co. v. Foster*, 35 Id. 134, *Wright v. Brown*, 44 Id. 224, and is the unquestioned law of the state. In the former case, Chief Justice Gibson said (p. 247): "Nothing in the law is more to be deprecated than those decisions in which the right of a *cestui que trust* to dispose of his estate has been recognized. Every attempt to secure a provision to a spendthrift son must prove abortive while the trustees are bound to follow any disposition of it which he may make. It is still more unfortunate that, as regards their separate estates, *femes covert* have been regarded in equity as *femes sole*. It has been justly remarked, that if the principle be pushed to its extent, a married woman who has trustees will be infinitely worse protected than if she were left to her legal rights." In the very same year, in *Fisher v. Taylor*, 2 Rawle, 33, the court (carrying out the expressed views of the chief justice), where land was purchased by and conveyed to executors under the provisions of the testator's will, in trust for the testator's son, who was to have the rents, issues, and profits thereof, but the same not to be liable to any debts contracted or which may be contracted by his said son, and at his death the said land to vest in the heirs of the body of the said son in fee, held, that the son has not such an interest in the land as could be taken in execution and sold for his debts.

After stating that the executors necessarily took the legal

estate for the purposes of the trust, in order to give effect to the testator's intention, Smith, J., said (p. 37): "A man may undoubtedly so dispose of his land as to secure to the object of his bounty, and to him exclusively, the annual profits. The mode in which he accomplishes such a purpose is by creating a trust estate, explicitly designating the uses and defining the power of the trustees. All this, we think, has been sufficiently effected in the case under consideration. Nor is such a provision contrary to the policy of the law or of the act of assembly. Creditors cannot complain because they are bound to know the foundation upon which they extend their credit. The act of assembly, cited from 1 Smith's Laws, 7, does not apply, the land in question not being the land of Sample Taylor, the defendant. He has no life estate in it, nor any interest in it which is subject to be sold for the payment of his debts. The benefit he derives under the will of his father is merely the right of receiving from the trustees the rents and profits of the premises which they hold under the deed from John Graham and wife; to the perception of those rents and profits they are in the first place entitled for the purpose of fulfilling their trust."

The same in principle was decided in *Holdship v. Patterson*, 7 Watts, 547, in 1838, Chief Justice Gibson delivering the opinion of the court; in 1843, by Justice Kennedy, in *Ashhurst v. Given*, 5 Watts & S. 323, who quotes approvingly the language of the chief justice in the former case. "A benefactor may certainly provide for a friend (and especially a child) without exposing his bounty to the debts or improvidence of the beneficiary. He has an individual right of property in the execution of the trust, and to deprive him of it would be a fraud on his generosity (parental duty). To appropriate a gift to a purpose or person not included would be an invasion of the donor's private dominion." *Fisher v. Taylor*, 2 Rawle, 33, was distinctly affirmed in *Vaux v. Parke*, 7 Watts & S. 19, in 1844. Sergeant, J., speaks of "a simple trust, which gives the *cestui que trust* a right to the possession, control, and disposal of the lands, and a special trust, which gives him no more than the right to enforce in equity the intention of the testator to the extent of his interest. The distinction between these two classes of trusts pervades the whole doctrine of trusts, and without a due regard to it their existence cannot be preserved."

The subject was discussed in 1847 by Coulter, J., in *Norris*

v. *Johnston*, 5 Pa. St. 287, in which he compares the English rule with our rule. In both the creditor loses; but by ours the intention of the testator is carried out in favor of the object of his bounty. Ours is a humane rule, whilst the English one is harsh and unnecessarily severe, and has been largely affected by the bankrupt law, which has no existence with us.

In *Eyrick v. Hetrick*, 13 Pa. St. 491 (1850), Bell, J., said: "The fact that the conveyance was made to assume the form of a trust, and for the special purpose of keeping John's creditors at bay, makes nothing against its validity, so far as the latter are concerned, for neither policy nor equity prohibits a parent to make such provision for the maintenance and comfort of an insolvent child; on the contrary, these trusts are favored and sustained by the law, as suggested by the best feelings of our nature, and doing harm to no one: *Fisher v. Taylor*, 2 Rawle, 33; *Holdship v. Patterson*, 7 Watts, 547; *Ashhurst v. Given*, 5 Watts & S. 323."

In *Brown v. Williamson*, 36 Pa. St. 338, in 1860, several of these cases are distinctly approved by the learned judge in the court below, and by my brother Strong, in affirming the judgment. All these cases were decided with a full knowledge that they were not in conformity with the English decisions.

A similar policy prevails in Connecticut: 2 Revision of Swift's Digest (1853), pp. 121, 122; and is affirmed in *Leavitt v. Beirne*, 21 Conn. 8, 9. "A provision may be made for the support of a child, relation, or other person, by vesting a fund in trustees to be applied to that purpose. In this way a man may provide for a daughter who has an improvident husband, or for an improvident child, and may make a permanent provision for the support of a family."

So the legislature of Pennsylvania, seventy-one years ago, converted a naked authority to executors to sell into an estate in the land, and the executors into trustees, and the policy has been carried out by the courts in good faith.

In New York, where a systematic change in the doctrine of trusts was made by legislative authority, by which all uses and trusts, except as therein modified and authorized, were abolished, and all estates and interests in lands were made legal estates, except when otherwise provided, certain express trusts were allowed to be created. Amongst these was a trust "to receive the rents and profits of lands, and apply them to the use of any person during the life of such person, or for any shorter term": 3 R. S. 16.

The Revised Statutes provide that every express trust, valid as such in its creation, except as therein otherwise provided for, shall vest the whole estate in the trustees, in law and equity, subject only to the execution of the trust. The persons for whose benefit the trust is created shall take no estate or interest in the land, but may enforce the performance of the trust in equity; and no person beneficially interested in a trust for the receipt of the rents and profits of lands can assign or in any manner dispose of said interest: 3 R. S. 21.

The security of the *cestui que trust* is complete, and under no circumstances can he be deprived of a maintenance. The case of *Noyes v. Blakeman*, 6 N. Y. 567, is one of the strongest instances of the inflexibility of the rule in preventing a *feme covert* from rendering her interest liable. "It is an error," says Judge Welles (p. 579), "therefore, it seems to me, to call this right a separate estate. It is no estate whatever." And such is the general rule as to all *cestuis que trust*, who are strictly only entitled to enforce an execution of the trust, but have no estate in the land.

The only question of importance in the case before us is the nature of the estate vested in his executors by the will of James Bell. The fifth clause in the will devises and bequeaths to his executors all the residue of his estate, real and personal, to hold to them and the survivor of them in trust for certain uses and purposes,—these are to lease the real estate, keep invested the personal estate in bond or mortgage, or other safe and substantial securities, collect and receive the rents, interest, and income, and profits thereof, and out of the said income pay all expenses attendant necessarily incurred in keeping the said real estate in good order and repair, and all taxes and lawful charges that may be assessed or levied, as well upon the said real estate as the said personal estate, and also all expenses attendant upon the collection of the said rents and income, and pay over and distribute the income of the said estate, real and personal, as follows: One-third part to his son James Bell for and during all the term of his natural life; one-third part to his son John Bell for and during all the term of his natural life; one-third part to his daughter Eliza Field for and during all the term of her natural life, for her own separate use, so that the same shall not be taken for the payment of the debts of her present or any future husband; then follows certain provisions looking to the death of the survivor of his three children, as the period at which the devisees

are to be ascertained, who should be entitled to the capital of his property. In case all his children died without lawful issue then surviving, his said estate, real and personal, is to descend and be vested in such persons as by the laws of Pennsylvania is directed concerning the estates of intestates. In case of the decease of one or two of his children, not leaving lawful issue, then one moiety of the said net income to be paid to each of the survivors, or the whole thereof to the survivor, as the case may be, during the natural life of the said survivors or survivor.

In case of the decease of one or two of his children, leaving lawful issue, then the portion of the said interest and income that was paid to such parent prior to his death, to be paid to such issue in equal proportions, if there be more than one, during the natural lives or life of the survivors and survivor of his said children.

Upon the decease of the survivor of his children, then his executors or the survivor of them to divide, pay, assign, and distribute his said estate, real and personal, to and among the issue of his said children in equal shares; such issue and their descendants, if any, taking and receiving only such part or share thereof as his, her, or their deceased parent would have been entitled to if then living.

The executors were also authorized to sell either at private or public sale or let on ground-rent, such parts of said real estate as they thought ought to be sold, and to convey the same. All ground-rents reserved by the executors to be held by them and the survivor of them to the uses and purposes before set forth; and all purchase-money to be invested in other real estate, or ground-rents, or bond and mortgage, or in some other safe and substantial security, to be held for the same uses and purposes.

It is clear, therefore, that the testator intended his executors to be invested with a trust estate, which should not expire until the death of the survivor of his three children. The trust was an active one, demanding the personal attention of the trustees, and being restricted to three lives actually in being at the death of the testator, does not infringe upon the rule against perpetuities; nor is there any prohibition against alienation by the *cestuis que trust*. Upon the death of the surviving child this active trust ceases, and the estates become vested in the parties entitled to it at that period. The estate, therefore, in the *cestuis que trust*, is an equitable one during the

lives of the three children, and of their survivors and survivor. Whatever may be the estates to which any one may be entitled at the death of the survivor, they are legal according to our law.

The auditor, however, entertained a different opinion, and at the date of his report the devisees were James Bell and Eliza Field, then a widow, and James Bell, a minor child of John H. Bell, deceased, called John Bell in the will; the said James Bell being born after the death of the testator. The auditor, upon the authority of *Kuhn v. Newman*, 26 Pa. St. 227, held that there is no trust whatever, and that, in other words, the trust is executed. This decision of the auditor renders nugatory all the careful provisions of the testator made to preserve his estate during the lives of his three children; and this obliges us to consider the grounds upon which that case was decided. It has been complained of at the bar as unsettling the law of trusts in Pennsylvania, and has been the subject of grave criticism.

The principal error is in laying down as the law of Pennsylvania, that a trust to receive rents and pay them to another is executed, although not a use executed by the statute of uses, but arising from some general principle inherent in the common law of the state. This is not supported by authority; for in *Pullen v. Rianhard*, 1 Whart. 521, it was distinctly held that in such case the legal estate must continue in the first devisee, so that he might perform the trust; because, without having the control of the estate, he could not receive the rents and pay them over as directed. This was clearly the law then, and there was no act of the legislature changing it between that decision and the one under discussion,—a lapse of only twenty years.

The general observations as to the futility of restraints upon property must be limited by the law, as emphatically declared in the two classes of cases commencing with *Lancaster v. Dolan*, 1 Rawle, 231 [18 Am. Dec. 625], and *Fisher v. Taylor*, 2 Id. 33; nor is the jurisdiction of the orphans' court, which has existed with various powers from the foundation of the province, a sufficient reason for annihilating the settled law of trusts for minors, and depriving a parent of the power of choosing the persons who shall control and manage the estate he gives to his child. That this is not the law is clearly shown by two cases of undoubted authority. In *In re John Wilson's Estate*, 2 Pa. St. 325, the testator had, by his will, in 1825,

given his estate among his nephews and nieces; the share of William Wilson, one of his nephews, he gave to his executors thereafter named, and to a majority of them who might take on themselves the execution of his will, and to the survivor in trust, to invest and apply the income to his maintenance, with authority at discretion to pay him part or the whole of the principal. In 1845 William Wilson was found a lunatic, and a Mr. Corson was appointed committee of his person and estate, who claimed to take the share of the lunatic. Chief Justice Gibson (p. 329) said: "Again, Mr. Corson's demand William Wilson's share as his committee was properly disregarded.

"The testator devised his estate to his executors in trust, to invest the share in stock or put it at interest, and apply the income to the lunatic's use, or pay him the whole or part of the principal, at their discretion.

"By what law, then, could the appointment of a committee take this trust out of the hands in which the testator had placed it, and vest it in one who can exercise no greater or other right than could, were he sane, be exercised by the lunatic himself? The estate was devised to the trustees *qua* executors; and if the distinction were material, it would consequently be clear that the appellant succeeded to the trust vested in his wife by succeeding to her executorship, with which it was indivisibly joined. But whether the appellant or his wife be the trustee, it is certain that Mr. Corson is not; and it is enough to prevent him from getting the direction of the lunatic's estate that there is a trustee either *in esse* or *poss.* The testator had a right to appoint his own trustee; and if the office were vacant, the proper course would be to fill it by appointment, for which the lunatic's committee, whose business it is to call the trustee to account, would be the most improper person that could be selected."

In *Vanartsdalen v. Same and Cornell's Appeal*, 14 Pa. St. 884, a grandfather appointed his executors guardians of his grandchildren, and gave them, the executors, the management of the estate devised by him to his grandchildren, and the father waived his parental right. It appeared that the father, after waiving his parental rights, applied to the orphans' court and had a guardian appointed for his children, who discontinued an ejectment for the children commenced by the executor, who was appointed by their grandfather's will their guardian.

Judge Rogers, delivering the opinion of the court (p. 887),

said: "Even conceding the testator has appointed a guardian for the persons of his grandchildren, as well as a trustee or curator for the estate devised, yet the appointment would be good, inasmuch as the father has submitted to the will by an enjoyment of the estate devised in right of his wife during her life. For it is only since her decease he has acted in opposition to the will. . . . It is plain the testator does not mean to interfere with the natural right of the father to the custody and care of his children; all that is intended is to commit the management of the estate to his executors, who are appointed guardians of the children. It is of no sort of consequence that he designates them as guardians rather than as trustees or curators of the estate for the benefit of the infants. The will must receive such a construction as is beneficial to the minors, at the same time carrying out the intention of the testator. The disposition in the will does not require the assent of the father, as none of his rights are affected by it, nor is it in his power to defeat its provisions, or by any opposition work a forfeiture of the estate, as perhaps might be the case if the grandfather had undertaken to deprive him of the care and management of his children. What right has he to complain when a grandfather or mother, or even a stranger, devises an estate to his children, coupled with a condition that its care and management shall be intrusted to another rather than to him?

"The orphans' court have disregarded this distinction. They have treated the appointment by the grandfather as null and void, and have proceeded to appoint a stranger as guardian, without any notice whatever to the testamentary guardian. But so far from being void, it is not even voidable, except on proof of fraud or gross mismanagement, or some personal disability of the guardian. This we think is altogether irregular and erroneous, and for this reason the proceedings in the orphans' court must be reversed."

This decision is supported by the case of *Smithwick v. Jordan*, 15 Mass. 113, where, under almost entirely similar circumstances, the same doctrine is laid down by Chief Justice Parker. There the devise was to a minor of seven years in fee, but he was not to come into possession, occupy, or have any advantage of said estate during his minority, except through his guardian. The testatrix appoints her executor to be guardian of the minor until he shall attain the age of twenty-one years, if he shall so long live; directs the guardian

to lease, occupy, and improve the estates, and from the rents and profits to maintain and educate the minor. The court said: "A present estate in fee was devised, and it was the possession only which was postponed. . . . And the words of the will are sufficient to create a trust estate in the tenant (the guardian) by which he may hold the estate for the purpose for which the trust was created, until by the will the devisee can take possession for himself."

In *Steacy v. Rice*, 27 Pa. St. 75 [67 Am. Dec. 447], the trust for the married woman was not for the trustee to receive and pay over, but simply for her use; and the husband having died, the court held that the life estate of the widow became a legal one, which does not touch the present question. In *Bush's Appeal*, 33 Id. 85, two judges dissented. In *Kay v. Scates*, 37 Id. 31 [78 Am. Dec. 399], my brother Strong evidently proceeds on the authority of *Kuhn v. Newman*, 26 Id. 227.

In Massachusetts, our old-settled doctrine prevails: *Cleveland v. Hallett*, 6 Cush. 403; *Fay v. Taft*, 12 Id. 448; *Smithwick v. Jordan*, 15 Mass. 113, above cited. In *In re Birtle's Estates*, 32 L. Jour. Ch. 439, the lords justices, on the 25th of May last, decided in a case like the present, that the trust estate remained in the trustees during a life or lives in being, and on the expiration of the last life it vested in persons in fee-simple, who were not ascertained until that event happened. In this case, property was by will limited to trustees during the life of the longest liver of the testator's wife and five children, and from the death of such longest liver to the respective issue then living of his children, in undivided fifth shares as tenants in common in fee, with cross-remainder limitations. The longest liver of testator's wife and five children died in 1861, when the property vested absolutely in fee in undivided shares in numerous individuals. The absolute vesting was thus postponed for six lives in being at the death of the testator, and might have been carried twenty-one years further: *Pownall v. Graham*, 9 Jur., N. S., 318.

The question then is, Shall the settled law of Pennsylvania as to trusts remain as it was understood by all our tribunals and by the bar, and had been received since the foundation of the province to within the last eight years? or are we, without the sanction of the legislature, entirely to uproot it, and substitute a new system which has been the subject of serious criticism and constant complaint?

We do not approve of such judicial legislation, and are therefore of opinion that the auditor and the court below erred in declaring that there was no estate vested in the trustees of the testator's will, and so far their decree must be reversed. It is therefore ordered, decreed, and adjudged, that so much of the decree as declares that there is no estate vested in the trustees of the testator's will be and the same is hereby reversed, and all proceedings upon that declaration are reversed, and the residue of the said decree is affirmed. The costs to be paid by the estate in the hands of the trustees.

ACTIVE TRUSTS, WHAT ARE, AND WHEN TRUSTS ARE TREATED AS EXERCISED: See *Kay v. Scates*, 78 Am. Dec. 399; and see the extended note thereto 406-410, on the cases in which the legal estate vests in the beneficiary under the statute of uses. *Kuhn v. Newman*, 26 Pa. St. 227, and *Kay v. Scates*, *supra*, so far as it affirms *Kuhn v. Newman* in the ruling that trusts to preserve an estate against the improvidence of children, and the like, vest immediately in the beneficiary, are said to be overruled by the principal case and those subsequent to it: *Rex's Estate*, 1 Brewst. 439; S. C., 6 Phila. 359; *Clarke's Estate*, 6 Id. 163; *Bacon's Estate*, 6 Id. 335; *Keyser v. Nicholas*, 7 Id. 151; *Karker's Appeal*, 60 Pa. St. 146. A devise to a trustee for life or lives, imposing upon him active and continuous duties, which are necessary to be performed to preserve the remainder, or to preserve the estate against a husband, or creditors, or the improvidence of children, as to hold property and collect, and pay to the beneficiary or otherwise apply the rents and profits, is such a power of management as vests the legal estate in the trustees: *Locke v. Barbour*, 62 Ind. 584; *Clarke's Estate*, 6 Phila. 163; *Credland's Estate*, 7 Id. 59; *Keyser v. Nicholas*, 7 Id. 151; *Shankland's Appeal*, 47 Pa. St. 114; *Sheet's Estate*, 52 Id. 267; *Wells v. McCall*, 64 Id. 213; *Ogden's Appeal*, 70 Id. 507; *Goehring's Appeal*, 81½ Id. 287. Were the devise one in trust merely, to permit a third person to receive the rents and profits, the estate would vest immediately in the beneficiary: *Tappan's Appeal*, 45 N. H. 321. Where the direction of an active trust is that the trustees are to convey after expiration of the term of the trust, they do not continue as trustees for such person, but the trust terminates, and the legal estate may vest without conveyance: *Reichenhausen v. Keyser*, 48 Pa. St. 354; *Bacon's Appeal*, 57 Id. 513; *Keyser's Appeal*, 57 Id. 241; *Rife v. Geyer*, 59 Id. 396; *Dodson v. Ball*, 60 Id. 496; *Westcott v. Edmunds*, 68 Id. 37. All the above cases cite the principal case to the points stated.

GIRARD LIFE INSURANCE AND TRUST COMPANY v. CHAMBERS.

[46 PENNSYLVANIA STATE, 406.]

ACTIVE TRUST IS CREATED AND ESTATE VESTED IN TRUSTEES by devise of real and personal estate in trust "to collect and receive the rents, issues, interest, and income therefrom," and after deducting expenses, "to pay over the same into the *cestui que trust* for his own use and benefit, or to such person as by his order in writing he may authorize to receive the same," and upon his decease to assign, transfer, and convey the said estate so held as he by his last will shall appoint, and in default of appointment, to such person or persons, for such estates and in such shares, as would be entitled to the same had he died seized thereof intestate; but the income for life under such a devise becomes the absolute property of the *cestui que trust*, and therefore attachable by his creditors; and could only be secured to the *cestui que trust* by provisions in the will against alienation and liability for debts.

EXECUTION in attachment at the suit of John Chambers against Silas E. Weir (*cestui que trust* under the devise mentioned in the opinion), in which the Girard Life Insurance and Trust Company (the trustee under such devise) was summoned as garnishee. The opinion states the facts.

John C. Mitchell, for the plaintiff in error.

Russell Thayer, for the defendant in error.

By Court, READ, J. *Anderson v. Dawson*, 15 Ves. 532, was the case of a settlement by a *feme sole*, in contemplation of marriage, of part of her fortune, in trust to pay the dividends to herself for her separate use for life, and after her death, for her intended husband, and after the death of the survivor, to transfer the capital to her appointment by will, and in case she should die without appointment, and he should be then dead, in trust for her next of kin, their executors and administrators, according to the statute of distributions. She became a widow, and filed a bill praying that the trustees may be decreed to transfer the stock to her on the ground that she was absolutely entitled to it, discharged of the trusts of the settlement. Sir William Grant dismissed the bill, holding that the widow had only a life estate, with a power of disposition by will. He said (p. 536): "This bill can be supported only upon the assumption that the plaintiff has the absolute property in the fund, and is not merely entitled for life, with a power of disposition by will. In order to make that out, it must be shown that the ultimate limitation to her next of kin

is either wholly inoperative or is in effect a limitation to herself; but there is a great difference between a limitation to the executors and administrators and a limitation to the next of kin. The former is, as to personal property, the same as a limitation to the right heirs as to real estate; but a limitation to the next of kin is like a limitation to heirs of a particular description, which would not give the ancestor having a particular estate the whole property in the land. The meaning of 'next of kin' of the plaintiff must be those who answer that description at her death, who may be very different persons from her administrators." In the last edition of his celebrated treatise on powers, pp. 638, 639, Lord St. Leonards states this to be the law, using the very words of the master of the rolls. In *Edwards v. Saloway*, 2 Phill. Ch. 625, it was held by Lord Cottenham, that a gift to trustees by will of a fund in trust for the wife's separate use for life, and after her death, as to part for such persons as she should appoint by deed or will, and in default of such appointment, a gift thereof unto and amongst her next of kin, as in the case of distribution of intestates' effects, prevents a lapse by death in her husband's lifetime, and her next of kin take. This case is stated to be the law by Lord St. Leonards, and also in 2 Jarman on Wills, 3d ed., 721, and Tudor's Leading Cases on Real Property, 2d ed., 815. The same doctrine is laid down in *Hansen v. Miller*, 14 Sim. 22, Vice-Chancellor Shadwell saying (p. 26): "The other argument in favor of the lady's claim was founded on the trusts of the settlement; I mean the trust which gives her power to dispose of the fund by her will and the ultimate trust in favor of her next of kin. But my opinion is, that, as the law now stands, neither of those trusts can be held to enlarge the interest which she takes under the first trust," which was to pay her the income during her life; and the declaration made by the vice-chancellor was, that she was absolutely entitled to the dividends of the consols during her life.

This rule is distinctly recognized by Chancellor Kent in *Jackson v. Robins*, 16 Johns. 388. "Where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee, and the only exception to the rule is, when the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion": 4 Kent's Com.,

9th ed., 633, 634. In *Flintham's Appeal*, 11 Serg. & R. 19, Judge Gibson applies the rule to personal estate. "In general," says he, "the bequest of a legacy to be at the disposal of the legatee is a bequest of the absolute interests; but a power of disposition at death, ingrafted on an express limitation for the life of the legatee, will not enlarge his interest by implication against the express intention of the testator." The same rule is stated by the same learned judge, when chief justice, in *Morris v. Phaler*, 1 Watts, 390, and in *Hess v. Hess*, 5 Id. 191, where the chief justice says: "The implication of absolute ownership from a general power of disposal may be rebutted by the express gift of a lesser interest, which is inconsistent with it. Such is the principle of *Morris v. Phaler*, 1 Id. 390, and the cases from which it was extracted." *Smith v. Starr*, 3 Whart. 62 [31 Am. Dec. 491], was decided upon the principle above stated by Chancellor Kent in *Jackson v. Robins*, 16 Johns. 388.

I have been more particular in citing and stating these different authorities, both with regard to real and personal estate, because if *Harrison v. Brolaskey*, 20 Pa. St. 299, cannot be reconciled with them, upon the ground that there was no express limitation of an estate for life in Mrs. Harrison, it is clearly not the law: *Potts's Appeal*, 30 Id. 168, in which the opinion of the court below was simply adopted by this court, decided that the words used created an estate-tail in the real property, and of course an absolute interest in the personalty. The other cases cited by the defendant in error are either overruled or modified, so as not to bear on the case before us.

In *Ralston v. Waln*, 44 Pa. St. 279, this question came directly before us last winter, and we decided, on the authority of *Anderson v. Dawson*, 15 Ves. 532, and *Hansen v. Miller*, 14 Sim. 22, that a deed of trust which gave a life estate to Mrs. Ralston (then a widow), with a power of appointment by will, in default of the exercise of which power it was given to the person or persons who would be her next of kin at her decease, by the intestate laws of Pennsylvania gave here only a life estate, and that she was not entitled to a conveyance or transfer of the personalty, which was the subject of the trust from the trustees.

The judgment of the Rev. John Chambers against his stepson, Silas E. Weir, was on a bond and warrant of attorney, and entered to July term, 1857, No. 35; and the will of his wife, Mrs. Martha H. Chambers, was dated the 14th of May,

A. D. 1859, to which there were two codicils, dated respectively the 28th of July in the same year, and the 29th of February, 1860. The will and codicils were proved the 22d of March, 1860, and letters testamentary were granted to the executors, William Weir and Robert Ewing. On the 13th of April, 1860, the attachment execution, which is the subject of our consideration, was issued by the plaintiff upon his judgment above stated, and served upon the Girard Life Insurance, Annuity, and Trust Company, who were summoned as garnishees. On the 22d of August, 1861, the executors of Mrs. Chambers transferred and handed over to the said company, as trustees for Silas E. Weir, named in the will upon the trusts in said will mentioned, the loans, bonds, stocks, and cash mentioned in the verdict of the jury, being one-fourth part of the residuary real and personal estate bequeathed and devised by the said will. The trusts were "one other equal fourth part thereof unto the Girard Life Insurance, Annuity, and Trust Company of Philadelphia, and their successors, to have and to hold the same in trust, nevertheless, for the following uses and purposes: that is to say, during the life of my son, Silas E. Weir, to collect and receive the rents, issues, interest, and income therefrom, and (after deducting all proper expenses for the execution of this trust) to pay over the same unto the said Silas E. Weir for his own use and benefit, or to such person as by his order in writing he may authorize to receive the same, and, upon the decease of the said Silas E. Weir, to assign, transfer, and convey the share and estate so held, to and amongst such person or persons, and in such parts or shares, and for such estates and uses, and in such manner as the said Silas E. Weir, by his last will and testament in writing, duly executed in the presence of two or more subscribing witnesses, shall direct and appoint; and in default of any appointment, as aforesaid, then to such person or persons for such estates, and in such shares as by the laws of the state of Pennsylvania would be entitled to the same, as if the said Silas E. Weir had died intestate and seised and possessed thereof."

By the thirteenth and succeeding clause, the said trustees are given full power to sell all or any part of said trust fund, and to reinvest the same as they think proper, to be held upon the same trusts and for the same interests and purposes, and the testatrix directs the said fund shall be paid over to the said trustees as soon as practicable after her decease, "so that

the income therefrom may accrue to the" person "to receive the same with as little delay as possible."

It is certain that the trust vested in the company is an active one, and vests the legal estate during the life of the *cestui que trust* in the trustees. The trustees are to collect and receive the rents, issues, and interest, and pay over to the *cestui que trust* during his life only the net, not the gross, income, and they are invested with large powers, which can only be exercised by them as the holders and legal owners of the trust fund. The interest, therefore, of the *cestui que trust*, is at best but a life estate, and this brings this case within all the decided cases; and as Silas E. Weir could not have gone into a court of equity and demanded a transfer of the whole fund to himself, so neither can an attaching creditor, who simply stands in the shoes of his debtor, take the *corpus* of the fund.

There can be no doubt of the intention of the testatrix to secure the income of this fund to her son during his natural life, for the draughtsman of the will has used nearly the identical language of the will of Dr. Thomas Parke, the effect of which was decided by this court in *Vaux v. Parke*, 7 Watts & S. 19. That, however, was the case of real estate, and there was an additional provision tending to show that the testator intended to protect the estate devised in trust against the creditors of the *cestui que trust*, the son. *Vaux v. Parke*, *supra*, determined that the *cestui que trust* had not such an estate in the land as was bound by the judgment, which it was essential he should have in order that it might be taken in execution and sold. In the present case the income for life could have been secured to the son by provisions against alienation and liability for debts, but this has not been done, and we are reluctantly obliged to defeat the intention of the mother to provide a maintenance for her son, by giving the income during the life of the son to the attaching creditor, who can receive from the trustees only what the son would be entitled to.

These trust companies are now daily performing the offices of guardians, executors, administrators, and trustees, and we deem it proper to say that we shall strictly exact the same measure of care in the execution of their trusts that we do from individuals, and that we shall expect them to protect their *cestuis que trust* from every attempt to appropriate the funds to purposes for which they were not designed. We give the general warning without reference to any particular case.

Judgment reversed, so far as regards the principal of the trust fund, and judgment entered upon so much of the verdict as consists of income, that is, for \$924.75, the costs to be paid by the plaintiff, the attaching creditor.

ACTIVE TRUSTS AND TRUSTS TO COLLECT AND APPLY RENTS AND PROFITS OF ESTATE DEVISED: See *Barnett's Appeal*, ante, p. 502, and the note thereto. In *Dodson v. Ball*, 60 Pa. St. 496, it is said that in Pennsylvania, for a while, the current of authority ran violently in favor of the policy of striking down trusts, but that with *Barnett's Appeal*, ante, p. 502, the current began to change and to set back strongly in favor of the donor's control, and that this was followed in the principal case and cases decided since then. Where in a trust the direction for payment of rents and profits permits such payment to be made or not, in the trustees' discretion, such rents and profits until paid do not vest in the beneficiary so as to be subject to attachment execution: *Keyser v. Mitchell*, 67 Pa. St. 476, citing the principal case.

EMLEN v. LEHIGH COAL AND NAVIGATION Co.

[47 PENNSYLVANIA STATE, 76.]

LOAN TO CORPORATION PAYABLE, AT FIXED TIME AND PLACE, DOES NOT BEAR INTEREST after the time so fixed for payment, whether the bond or evidence of indebtedness be presented or not; and it is not necessary, to escape after-accruing interest, that the amount of the loan, with accumulated interest at the time of payment, be kept separate from the other funds of the company, if it can be shown that funds sufficient for payment were at all times in hand.

ACTION of covenant upon a bond given by the Lehigh Coal and Navigation Company to plaintiff for a loan by her to the company. The opinion states the facts.

G. M. Wharton, for the plaintiff in error.

W. F. Judson, for the defendant in error.

By Court, READ, J. The general rule in this state is, that all debts draw interest, the legal rate of which for 141 years has been six per cent. This moderate and uniform rate has arisen, in a great measure, from our short and inexpensive proceedings in the case of mortgages, which securities have formed a permanent standard for other money contracts. There are, however, exceptions to the general rule, as in the case of banks, who are the debtors of their depositors, and of trustees who have not failed in the discharge of their trusts. And we must undoubtedly add the cases in which the United States and the several states have been prepared to pay their

loan-holders when their loan fell due, of which it is their practice to notify their creditors beforehand. It is true that these governments cannot be sued except by their own consent, and can therefore impose terms upon their creditors; but this is not the only reason, for it is obvious that they cannot go round the world searching for the individuals to whom they owe money. The result is, that these debts are payable at a fixed and known place of payment, and at a fixed period, at which time and place the loan-holder is to present his evidence of debt, and receive payment. Whether he does so or not, interest stops from that moment.

Within the present century large loans have been effected by great municipalities, and by canal and railroad companies of large capital, which are assimilated in amount and extent to at least the loans by the state governments. The city of Philadelphia has a funded debt of nearly twenty-five millions of dollars, and the Pennsylvania Railroad Company has home mortgage debts of over seven millions five hundred thousand dollars. Both these large corporations have their known officers in the city of Philadelphia, and the only real difference between their situation and that of a state government is, that they can be sued. The same rule might therefore be properly applied to them, with perhaps the proper condition that they should be able to show that they always had on hand a sum sufficient to pay the principal and any interest that may be due. In the present case, the defendants are one of those large canal and railroad companies whose office and place of business have always been in the city of Philadelphia, and they had in bank, when the bond of the plaintiff fell due, and at all times afterwards, cash to their credit sufficient to pay the loan to the plaintiff, principal and interest, and all other accruing and payable debts of the company, but they did not keep the principal of said loan, or the interest thereof, separate and apart from the rest of their funds. The plaintiff's bond was dated 21st of April, 1840, for nineteen hundred dollars, payable on the 1st of October, 1853, with six per cent interest, payable quarterly. No interest was paid from 1842, when her attorney in fact, Mr. Wistar, died. The plaintiff having been abroad in Europe during the whole of this period, and having no fixed residence, and having no person here authorized to act as her agent until, by a power of attorney executed at London in September, 1861, she appointed William S. Vaux her attorney in fact, who received the princi-

pal on the 12th of October, 1861, and the arrears of interest up to the 1st of October, 1863, on the 3d of December, 1862.

On the 15th of September, 1853, the defendants published a notice in the newspapers of Philadelphia, that the certificates of the company falling due on the 1st of October, 1853, would be paid on presentation of said certificates at their office, and also that the interest on all certificates so falling due would cease on the 1st of October aforesaid.

The company were not bound to seek their creditors in a foreign country: Co. Lit. 210 b; and the only difference between us and the court below is, that we think it was not necessary for the defendants to set apart specifically for the benefit of their debtor, so as to be entirely beyond their own control, or subject, under any contingency, for their debts or other liabilities, a sum sufficient to cover the debt, principal and interest. We are of opinion that the company did show their willingness and ample ability to pay the debt at all times, and that it was the negligence of the plaintiff only which prevented her receiving it when it fell due. In *Miller v. Bank of Orleans*, 5 Whart. 503 [34 Am. Dec. 571], if it had been shown that the acceptors always had in bank a sum sufficient to pay their acceptances, although the balance to their credit was always being used for the general purposes of the business, they would not have been held liable to pay interest on it.

Judgment reversed, and judgment entered on the special verdict for the defendant.

THOMPSON, J., was absent at *nisi prius* when this case was argued.

DUTY OF DEBTOR TO SEEK CREDITOR AND MAKE TENDER OF AMOUNT DUE. — Where a debt is due on a contract executed, and the party to whom it is payable is entitled to it without the performance of anything on his part, and the object of the debtor is to discharge himself from an action for it, an actual tender is necessary, unless dispensed with, and the tender must be pleaded at an early stage of the case, and the money brought into court: *Wagenblast v. McKean*, 2 Grant Cas. 393. In pursuance of this duty, a debtor is bound to seek his creditor, and make payment of his debt wherever he may be found within the state: *Littell v. Nichols*, Hardin, 66. But the debtor is not bound to go out of the state or realm to find his creditor: 2 Co. Lit. 210 b; *Santee v. Santee*, 64 Pa. St. 480, citing the principal case; but in such case he should appoint some place for payment at a particular time, and give the creditor notice thereof, and an opportunity to be in attendance: Co. Lit. 211 a; 1 Roll. Abr. 453. In *North Pennsylvania R. R. Co. v. Adams*, 54 Pa. St. 97, following the principal case, it was held that a company borrowing money to be paid at a certain time and place is not liable

for interest to a non-resident who resides abroad, and whose address is not known, after the loan falls due, in absence of proof of want of readiness or ability to pay. To the same effect, see *Miller v. Bank of Orleans*, 5 Whart. 503. Though no place of tender is assigned, and the creditor resides abroad, this will not excuse the duty on the part of the debtor to ascertain, if he can, where the creditor will receive tender: *Bixby v. Whitney*, 5 Me. 192. When tender and demand are essential to the procuring of a deed, the covenantee's ignorance of the residence of the covenantor previous to the conveyance will not excuse a tender: *Sage v. Ranney*, 2 Wend. 532. Where a party designedly absents himself to fraudulently avoid tender, he cannot object that no tender was made: *Southworth v. Smith*, 7 Cush. 391; and if a party, having evaded a tender, brought his action so soon as to prevent a tender before commencing the action, this will be a sufficient excuse for making no tender: *Gilmore v. Holt*, 4 Pick. 257. A refusal to receive money will excuse an otherwise necessary tender: *Dorsey v. Barbes*, 6 Litt. 204; and announcing his intention to refuse it, or denying the existence of the contract under which the tender would be necessary, will amount to an excuse of tender: *Duff v. Patten*, 74 Me. 390; *Koon v. Snodgrass*, 18 W. Va. 320.

To maintain a bill to restrain the recovery of more than is due on foreclosure of a mortgage, a tender is not a prerequisite, except as it might affect costs: *Cole v. Savage*, 1 Clarke Ch. 361. Where, after execution and payment of proceeds to the creditor, it is discovered that the property did not belong to the debtor, and a new execution is asked, a tender is necessary prior to relief: *Bachelder v. Wason*, 8 N. H. 121. No formal tender is necessary before filing a bill to remove an invalid tax title: *Hanscom v. Human*, 30 Mich. 419. In *Ashley v. Reeves*, 2 McCord, 432, it was held that an action for money had and received cannot, and an action for breach of warranty, express or implied, can, be maintained without a tender or return of the property. To restore property illegally seized, defendant must tender the thing at the place of seizure: *Powers v. Florence*, 7 La. Ann. 524. If money be appointed by will to be paid, and no place limited for the payment, there should be a request to pay the money, the executor not being bound to seek him to whom it is to be paid and make a tender thereof: *Anonymous*, Brownl. 46. If money paid is to be forfeited in case the residue be not paid by a certain day, the party who is to pay must tender or use his best endeavor to tender the balance due on or before the day limited: *Bayley v. Dwall*, 1 Cranch C. C. 283. Where a vendor, after giving possession of the land to the vendee under articles of agreement, obtains possession for himself again by fraud before the day for paying the purchase-money arrives, the vendee may recover in ejectment without tendering the purchase-money: *Harris v. Bell*, 10 Serg. & R. 39.

MILLER v. LAUBACH.

[47 PENNSYLVANIA STATE, 154.]

OWNER OF LAND THROUGH WHICH STREAM FLOWS MAY INCREASE VOLUME OF WATER by draining into it, without any liability for damages to a lower owner.

OWNER OF LAND CANNOT, BY ARTIFICIAL CHANNEL, DRAIN WATER standing upon his own land onto that of another.

Action on the case. The opinion states the facts.

Edward J. Fox and A. J. Knecht, for the plaintiff in error.

H. D. Maxwell and M. H. Jones, for the defendant in error.

By Court, THOMPSON, J. The portion of the charge to the jury in this case complained of as erroneous is as nearly in accordance with the doctrine laid down in *Kauffman v. Griessmer*, 26 Pa. St. 407 [68 Am. Dec. 437], and *Martin v. Riddle*, reported in a note thereto at page 415, as possible or necessary. The grounds of recovery on the part of plaintiff, and on which there was a very decided preponderance of testimony, was that there was wet or marshy ground on the defendant's land, occasioned by what was called winter springs by some of the witnesses, and which only saturated the earth without running off by a defined channel. To remedy this, the defendant constructed a drain through the land thus saturated to the plaintiff's land, and there discharged the water which was accustomed to remain on his own until carried off by evaporation. The plaintiff complained and proved that this rendered his land, to the extent of from one fourth to one half acre, wet and worthless. It was of such a state of facts that the learned judge said: "If the jury find from the evidence that the defendant did so collect the water from his own land, and turn it in a body upon the lands of the plaintiff, through an artificial channel made by the defendant, and this was to the injury and damage of the plaintiff, he is entitled to recover such damages as you believe from the evidence he has sustained." This is just the doctrine of the cases cited, and certainly the law of such a case.

No doubt the owner of land through which a stream flows may increase the volume of water by draining into it without any liability to damages by a lower owner. He must abide the contingency of increase or diminution of the flow in the channel of the stream, because the upper owner has the right to all the advantages of drainage or irrigation, reasonably used, as the stream may give him. But that is an entirely different thing from draining the water standing on the lands of one, through artificial channels, onto that of another. That cannot be done without his consent, and this was the substance of the charge below.

There was no error, and the judgment is affirmed.

AGNEW, J., was absent at *nisi prius* when this case was argued.

RIGHT OF OWNER OF LAND TO DISCHARGE WATER UPON LAND OF ANOTHER, and effect of increasing the natural flow: See the note to *Wheatley v. Baugh*, 67 Am. Dec. 728; and see also *Barrow v. Landry*, 77 Id. 199; *Hooper v. Wilkinson*, 77 Id. 194. In *Ramsdale v. Foote*, 55 Wis. 560, citing the principal case, it is said that one must use his property so as not to injure others in their rights. It is held that if a watercourse flows through lands, the owner thereof incurs no liability by collecting waters standing on his land and draining them to such watercourse, provided he does not increase the volume of water beyond the natural capacity of the stream so as to injure lower proprietors: *McCormick v. Horan*, 81 N. Y. 90, citing the principal case. But a land-owner cannot collect water upon his land and then by an artificial channel discharge it upon the land of his neighbor, so as to increase the flow thereon or upon a particular portion thereof: *Gillham v. Madison Co. R. R. Co.*, 49 Ill. 486; *Templeton v. Voskos*, 72 Ind. 137; *Pettigrew v. Evansville*, 25 Wis. 230, all citing the principal case.

FIFIELD v. PENNSYLVANIA STATE INSURANCE CO.

[47 PENNSYLVANIA STATE, 103.]

DISTINCTION BETWEEN PRIVATEERING AND PIRACY is the distinction between captures *jure belli* under color of governmental authority, and for the benefit of a political power organized as a government *de jure* or *de facto*, and mere robbery on the high seas committed from motives of personal gain, like theft or robbery on land. In the one instance the acts committed inure to the benefit of the commissioning power; in the other, to the benefit of the perpetrators merely.

CAPTURE BY PRIVATEER IN COMMISSION UNDER SO-CALLED GOVERNMENT OF CONFEDERATE STATES was held not to be piracy, for the reason that the President of the United States recognized such government, and the vessel as a privateer thereof, by exchanging the crew of such vessel which had been subsequently captured as prisoners of war.

STATUS OF CONFEDERATE STATES, SO CALLED, AS GOVERNMENT, discussed but not decided.

INSURER OF VESSEL IS NOT LIABLE FOR LOSS BY CAPTURE BY PRIVATEER under a policy in which the perils insured against include piracy, but in which liability for "loss by seizure, capture, or detention, or the consequences of an attempt thereat," are excepted.

ACTION of covenant on marine policy of insurance. The opinion states the facts.

Gibbons and G. W. Biddle, for the plaintiff in error.

E. Spencer Miller and B. Gerhard, for the defendants in error.

By Court, **WOODWARD, C. J.** This was an action of covenant upon a marine policy of insurance issued the 24th of November, 1860, for one year, upon the plaintiff's interest, valued at three thousand dollars, in the brig John Welsh, valued at twelve thousand dollars. The perils insured against

were the seas, fires, pirates, rovers, assailing thieves, jettison, etc., and the language of the excepting clause in one of the provisos was, "that the said company shall not be liable for any claim for or loss by seizure, capture, or detention, or the consequences of any attempt thereat."

The brig sailed from Philadelphia in May, 1861, to Trinidad de Cuba, and there took in a cargo of sugar, and sailed thence for Falmouth, England. On the 6th of July, being about 250 miles from the Nantucket shoals, she was captured by a stranger vessel, which floated French colors when first seen, but which ran up the secession flag before the capture, and which proved to be the privateer Jeff Davis, cruising under letters of marque issued by authority of the so-called Confederate States. The Jeff Davis subsequently captured the Enchantress, and afterwards her crew were themselves captured and brought to Philadelphia, where, under the name of William Smith and others they were indicted, tried, and convicted, but not sentenced, for piracy, in the circuit court of the United States. Their offense was laid as committed against the Enchantress, not the John Welsh. By direction of the President of the United States they were subsequently exchanged with the Confederate States as prisoners of war.

Upon this very brief statement of the leading facts of this case the question arises whether the loss of the John Welsh is to be regarded as a piratical loss or a capture *jure belli*. The circumstances of her capture were fully detailed on Smith's trial, and such acts of depredation and robbery were shown as would constitute the crime of piracy, unless the commission under which they were committed was such as to take away their piratical character. In passing upon this question we are authorized and requested by counsel on both sides to make use of the printed report of Smith's trial and of the History of the Times. It appears from the evidence on Smith's trial that the Congress of the Confederate States had authorized the President of that so-called government to issue to private armed vessels letters of marque and general reprisal, and that in pursuance of such authority commissions and instructions had been issued to the crew of the Jeff Davis, and that she was sailing under this authority when the John Welsh was captured. These instructions pointed to a war on the commerce of the United States alone, and enjoined the strictest regard to the rights of all neutral powers.

A pirate is usually defined as *hostis humani generis*, but a

more accurate description of the offense of piracy is, that it is robbery or forcible depredation upon the sea, *animo furandi*. It is usually contrasted with captures *jure belli*, as in the case of *United States v. Klintock*, 5 Wheat. 150. The distinction between privateering and piracy is the distinction between captures *jure belli* under color of governmental authority, and for the benefit of a political power organized as a government *de jure* or *de facto*, and mere robbery on the high seas committed from motives of personal gain, like theft or robbery on land. In the one instance the acts committed inure to the benefit of the commissioning power, and in the other to the benefit of the perpetrators merely. By the constitution of the United States, Congress is authorized to define and punish piracies and felonies committed on the high seas, and several acts of Congress have been passed upon the subject from 1790 down to 1861: See Brightly's Digest of U. S. Statutes. Privateering, on the other hand, has in all our history been claimed and defended as lawful warfare on public enemies. It is the substitute for enormous naval establishments. It was largely practiced in our Revolutionary struggle, is expressly recognized in the federal constitution, and when the principal maritime powers of Europe declared at the congress of Paris in 1856, that "privateering is and remains abolished," we refused to accede to the declaration; and the state papers of the time, from the pens of General Cass, our minister to France, and of the late Judge Marcy, then Secretary of State, contain the most unanswerable arguments against the surrender of our right of privateering. As late as the 8d of March, 1863, Congress authorized the President to issue letters of marque and reprisal "in all domestic and foreign wars."

Thus strongly is the distinction marked in our jurisprudence between piracy and privateering, and the question is, to which of these heads this case belongs. If the *Jeff Davis* was not a privateer, she was a pirate, and if she was a privateer, she was made so by the commission she bore. The legal effect of that commission, therefore, must depend upon the *status* of the Southern Confederacy. That it is a government *de jure*, no man who is faithful to the constitution of the United States will for a moment contend. But is it not a government *de facto*?

I do not find this kind of government sharply defined in any writers on public law; but I suppose that any government, however violent and wrongful its origin, which is in the actual exercise of sovereignty over a territory and people large

enough for a nation, must be considered as a government *de facto*. Vattel tells us that any nation which governs itself, under what form soever, without any dependence on foreign power, is a sovereign state. And our American ideas will accept from foreign nations no other authentication of the right to rule than the fact of ruling. General Jackson, in his message of December, 1836, in setting forth the uniform policy and practice of this government to recognize the prevailing party in all foreign disputes, told Congress that "all questions relative to the government of foreign nations, whether of the Old or New World, have been treated by the United States as questions of fact only." And this sentiment has been repeated numberless times in our state papers. There is no doubt, therefore, that the federal government is accustomed to concede not only belligerent rights, but civil authority also, to governments *de facto*.

Nor does it appear that an interval of peace is essential to the constitution of a government *de facto*, as was argued. The time of recognizing a new power is decided by each existing government for itself, and it may be delayed by the fact that the new power has had no peace, and a season of peace may be indispensable also to consolidate its administration; but where, as here, the inquiry relates merely to the existence of the new power, it would be very difficult to say that it did not exist because it did not exist in peace. To make war is one of the highest attributes of sovereignty, and quite as demonstrative evidence of vital existence as deeds of peace. The original thirteen states confederated in 1777, but did not achieve peace until 1783, and during those six years were in constant war; yet who doubts now—who ever did doubt—that in all that interval they were a government *de facto*?

The History of the Times tells us how the so-called government of the Confederate States came into existence. Certain states having acceded to the federal Union with other states under a constitution, perpetual and irrevocable except by common consent, did in 1860 and 1861, without the consent of the other states, and in flagrant violation of the federal compact, secede from that federal Union and confederate together under the name of the Confederate States of America, and set up over themselves, in a written constitution, a general government, whose seat or capital is the city of Richmond, and whose asserted jurisdiction is co-extensive with the territories of the seceded states. I have never seen their constitu-

tion, but I understand it resembles our own in many points, and that it establishes all the departments and functionaries of a regular republican government. It is a very unquestionable part of the history of the times that this government has carried on war, offensive and defensive, for more than three years, and that its belligerent rights have been recognized by the principal states of Europe, though, as a civil power, it has not obtained recognition by any of the nations of the earth.

Now, when we find such a government actually exercising sovereignty over a territory larger and a people more numerous than those of our original thirteen states, is it possible that, if the *status* of that government must be declared, anything less can be said of it than that it is a government *de facto*?

Obvious as the answer to this question may seem to be, it encounters, nevertheless, this serious difficulty: if secession did not dissolve the Union as to the seceded states, and place them beyond the pale of the constitution, then they are still under the constitution, which, in its tenth article, declares that "no state shall enter into any treaty, alliance, or confederation, grant letters of marque and reprisal, coin money, emit bills of credit," etc. How can they be a *de facto* government any more than a government *de jure* under the constitution of the United States? How can two sovereignties co-exist for the same purposes any more than two magnitudes can occupy the same space at the same time? The federal government and the state governments, both sovereign in their respective spheres, can co-exist over the same people, because governmental purposes and powers are divided between them, and so long as they exercise only the powers which they respectively possess under the constitution they move in harmonious orbits. Thoughtless men sometimes allege that people cannot be subject to two sovereignties, and thence infer that state sovereignty is a doctrine subversive of the just authority of the federal government; but if they would look upon their children, who are subject to one sovereignty at home and to another in school, they would see the riddle solved, and would learn how governments existing for different purposes and clothed with different powers may both be sovereign to the extent of their respective powers and to the advantage of those who are subject to both jurisdictions. But the confederate government exists for the same purposes, within the seceded states, for which the federal government was established, and hence the inconsistency. The one must displace the other. If the fed-

eral government, who alone have power under our constitution to issue letters of marque and reprisal, still exists in the seceded states, however its functions may be hindered and suspended, I see not how the government of the Confederate States can have power to issue letters of marque and reprisal. It is a governmental power expressly lodged with the federal government, and unless secession has had the effect to withdraw it, there it exists still in all the plenitude and exclusiveness of the original grant.

The legal consequences of secession, in this particular, have not been distinctly and authoritatively declared. Sometimes secession is treated as a nullity, and the acts and ordinances of secession are ignored. According to this view, the southern states are still integral portions of the federal Union, and all that has happened within them is mere insurrectionary resistance of the constitution and laws of the United States. If this be so, it must follow that the United States is the supreme government over the seceded territory, for its appropriate purposes, both *de jure* and *de facto*,—its functions, indeed, temporarily suspended in certain districts, but its existence unimpaired. This view seems to me as fatal to the *de facto* pretensions of the Confederate States as to the rightfulness of their dominion. Assuredly, they have no right to issue letters of marque and reprisal if another government, clothed with the exclusive right, exists among them.

The other view of secession is, that it was a revolution which took the seceded states entirely out of the Union, and made them, in respect to the federal government, foreign states. In the language of a distinguished congressional leader: "Having organized a distinct and hostile government, they have by force of arms risen from the condition of insurgents to the position of an independent power *de facto*,—the constitution and Union are abrogated so far as they are concerned, and, as between two belligerents, they are under the laws of war and the laws of nations alone."

These are the two views of secession on which the public men of the country divide, and between which some of them oscillate. Which shall the judicial mind adopt? I answer, that view, if it can be ascertained, which the political departments of the federal government have adopted. Not that the judiciary is ever, upon principle, to surrender its independence of judgment to the executive and legislative departments, but since the foreign relations of the federal government are

wholly intrusted to the President and Congress, the judiciary must accept them just as they have been recognized and established by the President and Congress. It is only from the acts and declarations of these departments that we can know judicially what governments exist and what rights we concede to them. This rule of decision was recognized by Chief Justice Marshall in *United States v. Palmer*, 3 Wheat. 634, and in *Foster v. Nielson*, 2 Pet. 307, and was very distinctly reasserted by Mr. Justice Grier in the *Prize Cases*, 2 Black, 670.

But even upon this principle it would be very difficult so to generalize the various, discrepant, and sometimes inconsistent measures that have been taken against the rebellion as to enable us to declare whether the President and Congress regard the seceded states within or without the Union. Fortunately, such a generalization is not necessary for the purposes of this particular case, because we have a fact here which is decisive of this case, however inconclusive it might prove in a larger application in connection with other facts. I allude to the fact that after the conviction of the crew of the *Jeff Davis* for piracy in a court of justice, the President interposed and restored them to the authorities of the Confederate States. The depredations upon the *Enchantress*, for which they were convicted of piracy, were the same in character and legal effect as those committed against the *John Welsh*. The capture of one vessel was no less piratical than the other. Guilty of piracy, the President might have pardoned them for reasons of state, but he did not,—he treated them as public enemies, and thus, in this instance, recognized the belligerent rights of the power that sent them forth, and the validity of the commission under which they sailed. No declaration could be more emphatic that they were not pirates, and because it came from that department to whom it is our duty to look for a definition of our relations with all surrounding powers, whether friends or enemies, we accept it and follow it instead of the judicial proceeding which resulted in the conviction of piracy.

I am very far from wishing to deduce too large inferences from this executive act, and am careful to make no general application of it. I would not infer from it alone that the President meant to recognize the Southern Confederacy even as a government *de facto*, nor that he considered secession a revolution that placed the states outside of the Union, and I

have no doubt that as a measure of policy it was dictated by motives of prudence and humanity; but in its bearing upon this particular case I cannot doubt that it was a recognition of the authority under which the Jeff Davis sailed. If all other vessels sailing under the same authority should be considered piratical,—nay, if this very cruiser should hereafter be so considered and treated,—yet, for the time present, and as to the transaction now under investigation, I must regard the capture of the John Welsh as a capture *jure belli*, and not piratical. That deference which is due to the constituted authorities of the country demands this conclusion. And the reasonings of the supreme court of the United States in the *Prize Cases*, 2 Black, 670, of this court in *Monongahela Ins. Co. v. Chester*, 43 Pa. St. 492, and of the supreme court of Massachusetts in *Dole v. New England Ins. Co.*, 6 Allen, 373, as well as the debates in the House of Lords upon the President's proclamation of blockade of the 19th of April, 1861, as given in the notes to Lawrence's last edition of Wheaton's International Law, pp. 248–253, all tend to support this conclusion.

That I may, if possible, preclude all misunderstanding, I repeat that I do not place this conclusion upon the evidence of the recognition by our government of the general belligerent rights of the Confederate States, much less upon my own private views of the effect of secession, which I have not undertaken to set forth in this opinion, nor upon those of any member of this bench; but I place it upon the deliberate and well-considered act of the President in exchanging the crew of the Jeff Davis as prisoners of war,—an act which, whatever its general effect, carries conviction to my judicial understanding that that crew must in this case be regarded as privateers, and not as pirates, and hence that the loss of the John Welsh was a "capture," within the excepting clause of the policy, and not a loss by "pirates, rovers, and assailing thieves."

The judgment is affirmed.

THOMPSON, J., concurring, said: "I had prepared an opinion in this case, coming to the same conclusion with the chief justice; but his opinion covers the whole ground taken by me, and his presentation is so much more satisfactory, that I forbear doing more than giving my concurrence in his opinion and his conclusions."

STRONG, J., while concurring in the affirmance of the judgment, was not prepared to adopt all the reasons assigned by the other judges therefor. After stating the case, he said that the question for determination was whether the loss of the vessel was a loss by piracy or a loss by capture, within the mean-

ing of the policy. He then said, that while the seizure of the vessel, as stated, was an undoubted act of piracy under the acts of Congress, and possibly by the law of nations, this fact alone would not answer the question, for if the loss was caused by seizure or capture, it would not matter whether the capture was lawful or unlawful, made by a recognized belligerent *jure belli*, or made without any legitimate authority, or even by a pirate, as the defendants had exempted themselves in the policy from loss by capture of any description, though it might be called by another name; citing 2 Arnould on Insurance, 808; Marshall on Insurance, 394. It is not the character of the agent, but the nature of the thing done, which determines whether the act is a capture: *Dole v. New England Mut. Ins. Co.*, 6 Allen, 373, and cases cited. These cases show that this word "capture" means any forcible taking out of the possession of an owner, whether lawful or not, by whomsoever the act is committed, and that it includes a piratical taking as well as one made by a government, or *jure belli*. Assurers have been held liable when the taking was not by a government either *de facto* or *de jure*, nor by any belligerent, and it has even been held not essential to a capture that the taking should be by external force: *McCargo v. New Orleans Ins. Co.*, 10 Rob. (La.) 202, where the loss of a slave cargo by insurrection of the slaves was held to be covered by an insurance against capture. *Powell v. Hyde*, 5 El. & B. 607, was a case in which a British vessel, insured against various losses, but excepting capture and seizure, was passing a Russian port (there being no war between Great Britain and Russia), when, for the purpose of detaining the vessel, a gunshot was fired toward her, which struck and sunk her. This, though an illegal seizure, since the arrest was not warranted, was still held within the exception. And in *Kleinwort v. Shepard*, 5 Jur., N. S., 863, the taking of a vessel by mutinous coolie passengers was held a capture, Lord Campbell in that case saying that the exception would extend beyond war risks and belligerent seizure, and even to a capture and seizure by pirates. Judge Strong therefore held, that though this seizure amounted to a piracy under the acts of Congress, the underwriters were liable, for they undertook against such piracies only as were not captures. He then referred to the state of the times, and said that the confederate government, so called, carrying on the war as it did, and exercising the jurisdiction and doing all the acts of a legitimate government, while it certainly was not a government *de jure*, as certainly did exist as a government *de facto*. And he continues, that while it can make no difference whether the seizure was made by a recognized government or not, it must most certainly be held that if it was done under authority of a *de facto* government, it was a capture within the meaning of defendant's policy, and hence a risk which they did not assume.

READ, J., concurring, said that the authorities cited on the questions involved do not govern the present case, because, while they determined the law between nations, and between legitimate governments and their rebellious subjects or citizens, the case at bar arose between a parent government and a rebellious portion of it. He claimed that the so-called Southern Confederacy was no government, and its followers were merely traitors, and those committing depredation on the high seas were pirates; and the fact that exchanges of prisoners were made did not amount to a recognition of the Southern Confederacy as a government *de facto* or *de jure*. Still, as concerns this policy of insurance, he said the word "pirates," as used, was evidently meant in the sense known to the commercial world, and in that sense such captors as took this vessel would not be held to be pirates, and the taking of the vessel would therefore be within the exception of capture.

AGNEW, J., also rendered a concurring opinion. After stating the facts, he said that two questions would arise: 1. Whether the letters of marque of the Jeff Davis and the nature of the war in which she was engaged divest these acts of their piratical character; 2. Whether it was a capture within the true meaning of this term as used in the policy.

The act of capture of the John Welsh was not divested of its piratical character by the commission under which the Jeff Davis sailed, for the reason that the letters of marque from the Southern Confederacy would not protect from a conviction for piracy, this latter having been judicially determined by the conviction of the crew of the Jeff Davis for piracy. The reason for this is that the confederate government was not and could not, by the United States, be considered either a *de facto* or *de jure* government. Judge Agnew then proceeded to define *de facto* governments *in extenso*, and to review the past and present *status* of the federal and so-called confederate governments. He held with some of the other judges that the fact of exchanging the crew of the Jeff Davis as prisoners of war was no recognition of the Confederacy as a government, and stated his reasons therefor. He further held that, until accomplished revolution, neither the President nor Congress could change the *status* of rebels as a portion of the people.

As to the second question, Judge Agnew said that while the commission of the Jeff Davis could not be used to characterize the capture as an act *jure belli*, yet it might be used to give character to the act as a capture within the meaning of the policy. The vessel acted, not as a freebooter, but under a commission to capture vessels of one government only, whom they declared to be their enemies. He then defined piracy in the same terms as did the chief justice. He also, following Read, J., referred to the commercial nature of the instrument, and the effect of that fact in construing a policy. He then said that, in a foreign jurisdiction, judgment would have been rendered as though the capture had been made by a regularly organized privateer. He also cited, as an authority in point, *Dole v. New England Mut. Ins. Co.*, 6 Allen, 373. For these reasons, he concurred in the affirmance of the judgment, holding that the exception in the policy was intended to cover a case of capture in the nature of an act of warfare, but not on the ground that the capture itself was an act *jure belli*.

THE PRINCIPAL CASE WAS CITED in *Mauran v. Ins. Co.*, 6 Wall. 15, as an authority fully discussing the proposition, whether capture by a confederate privateer was a loss by "piracy" within the meaning of that word, or was a loss by "capture" within the exception thereof in an insurance policy.

SCHOFIELD v. FERRERS.

[47 PENNSYLVANIA STATE, 194.]

IN ACTION ON CASE FOR MALICIOUS PROSECUTION, evidence that a criminal prosecution was commenced for the purpose of obtaining possession and ownership of personal property alleged to have been stolen is proof of want of probable cause, and consequently of malice.

IN ACTION FOR MALICIOUS PROSECUTION, WANT OF PROBABLE CAUSE IS EVIDENCE OF MALICE ONLY, and must therefore be referred to the jury for decision as to the existence of malice; and an instruction to the jury that if there was not probable cause the plaintiff should recover is error.

IN ACTION FOR MALICIOUS PROSECUTION in having commenced and maintained a criminal prosecution for the alleged theft of certain property, the record of a replevin suit, brought subsequently to the criminal prosecution for the same property, is not admissible to show a former recovery, nor in mitigation of damages.

ACTION on the case for damages for malicious prosecution, in having commenced and maintained a criminal prosecution for the alleged theft of certain property. Subsequent to the arrest of the plaintiff herein, the prosecutor, and defendant herein, offered to withdraw the prosecution if plaintiff would execute a bill of sale for the property, which he did. The prosecution, however, was not withdrawn, but was proceeded with, and resulted in a verdict of not guilty. Plaintiff then brought replevin for the property, and recovered the possession thereof. This action was then brought, to which the defendant pleaded probable cause. He also offered in evidence the record in the replevin suit to show former recovery and in mitigation of damages. The court refused to admit the record. The remaining facts appear in the opinion.

George H. Earle, for the plaintiff in error.

Henry T. King, for the defendant in error.

By Court, STRONG, J. That to maintain an action on the case for a malicious prosecution, both want of probable cause for the prosecution and malice in the defendant must be affirmatively shown, is familiar doctrine. Whether there was probable cause is a mixed question, partly for the court and partly for the jury. The court must determine what it is, but the jury must find the facts which are material to the question. When the facts are controverted, and in some cases where the actual belief of the prosecutor enters into the consideration of the question, a court can do no more than define what constitutes probable cause, and submit to the jury to find whether the constituents of it have been proved, or rather whether it has been shown that those facts were wanting which the law declares to be essential to justify a prosecution. This course appears to have been pursued in the present case. The jury were instructed what the law declares probable cause to be, and instructed rightly; and then they were directed to inquire whether the defendant had such cause for instituting the prosecution of which the plaintiff complained. Certainly, under the evidence as it is certified to us, it was not for the court to say there was probable cause

for the prosecution. The doubt, if any, is rather whether the direction should not have been given that if the facts of which there was evidence were proved, they established the non-existence of any probable cause. It is difficult to see where there was a deceptive appearance of guilt arising from facts and circumstances misapprehended or misunderstood by the defendant, so as to produce belief in his mind of the plaintiff's guilt, whatever may have been the impression made on the minds of others not so well informed. And if the prosecution was commenced as a means of obtaining possession and ownership of the horse alleged to have been stolen, of which there was considerable evidence, it will not do to say that want of probable cause for it was not made out: *Prough v. Entriiken*, 11 Pa. St. 81. The second, third, and fourth assignments of error cannot be sustained.

But the court instructed the jury that if there was not probable cause, they should find for the plaintiff. This was leaving out of view the second essential to the maintenance of such an action, namely, whether the prosecution was instituted maliciously, a question always for the jury, and one which must be proved affirmatively to entitle the plaintiff to a verdict. It is true that want of probable cause is evidence of malice, but it is not malice itself. It is to be submitted to the jury, for them to draw the proper inference. This appears to be almost, if not quite, the universal rule. How a criminal prosecution can be without malice when it is instituted without probable cause; how it can have originated from any other than bad motives, which the law denominates malice,—is not very apparent in most cases; yet the authorities uniformly hold that absence of probable cause is only evidence of malice. It has not the force of a legal conclusion, and therefore the existence of malice is a fact to be found by a jury. It is true, there are certain things which, if proved, the law declares to be conclusive evidence of malice, but mere want of probable cause is not one of them. If a prosecution be instituted for the purpose of extorting money or other property, the law implies malice: *Prough v. Entriiken*, 11 Pa. St. 81; and if in this case the prosecution against the plaintiff below was begun or continued to obtain a title to the horse alleged to have been stolen by him, that fact was conclusive evidence of malice, which the jury were bound to receive as such. Still, it was for them to find whether such was the motive for the prosecution. This seems to have been inadvertently overlooked in the

charge, very probably because the contest on the trial was mainly over the question whether there was probable cause for the prosecution. For this reason the judgment must be reversed. The record is very meager. If we had the case before us as it probably appeared at the trial, with the remarkable bill of sale obtained from the plaintiff below while he was imprisoned, and with the whole of the charge as delivered, this apparent error might prove unreal; but looking at the record as it stands, there was error.

The rejection of the record of the replevin in the district court was entirely correct. It was for a different cause of action. All that the plaintiff could have recovered in that suit was the value of the horse, and damages for taking him, increased perhaps by the circumstances which accompanied the taking. He could have recovered nothing for the personal injury to the plaintiff. This is an action for a personal wrong.

Judgment reversed, and a *venire de novo* awarded.

THOMPSON, J., was absent at *nisi prius* when this case was argued.

WHAT NECESSARY TO MAINTENANCE OF ACTION FOR MALICIOUS PROSECUTION, and rules as to probable cause and malice, and proof thereof: See the note to *Froeman v. Smith*, 12 Am. Dec. 265-268; and see *Parker v. Huntington*, 66 Id. 455, and *Bartlett v. Brown*, 75 Id. 675, and note.

FASSITT v. MIDDLETON. DE COU'S APPEAL.

[47 PENNSYLVANIA STATE, 214.]

SURETY FOR STAY OF EXECUTION IN JUDGMENT FOR ARREARS OF GROUND-RENT, who, after the expiration of the stay and judgment upon his recognizance of bail, pays the debt, interest, and costs, and obtains an assignment of the original judgment from the plaintiff's attorney, is not thereby entitled to priority over a judgment afterwards obtained by the same plaintiff for arrears of rent subsequently accrued.

WHETHER ATTORNEY AT LAW HAS POWER AFTER OBTAINING JUDGMENT TO ASSIGN IT, *quære*.

ATTORNEY AT LAW HAS NO POWER AFTER JUDGMENT TO MAKE SUCH ASSIGNMENT OF IT to one who pays it because he must do so as will continue the judgment to the prejudice of his client's rights in other respects.

ASSIGNMENT OF JUDGMENT FOR ARREARS OF GROUND-RENT, by attorney who has obtained it, to a surety for stay of execution who has paid the judgment upon his recognizance of bail, will not of itself interfere with the claim of the ground-rent owner to the proceeds of the sheriff's sale of the real estate bound, for his right takes effect by relation back to the

date of the deed by which the rent was reserved. To give the judgment assigned priority, there must be an estoppel by agreement to guarantee it, or some stipulation to postpone, for while the assignment may import warranty of title, it is not a guaranty of collection, or of the lien as primary, but only of a sound debt, unimpaired by secret defenses, payment, or other matter which would render it invalid.

APPEAL from decree of distribution of fund raised by sheriff's sale. The facts are stated in the opinion.

J. Cooke Longstreth, for the appellant.

A. S. Letchworth, for the appellees.

By Court, AGNEW, J. Fassitt's heirs, being the owners of a ground-rent, obtained judgment in covenant against John W. Middleton for arrears of ground-rent accruing during several years. Nathan Middleton became bail for stay of execution in this judgment. After the stay expired Fassitt obtained judgment against Nathan Middleton upon his recognizance of bail, and on the 27th of June, 1862, Nathan paid the amount of the debt, interest, and costs, and procured the original judgment against John W. Middleton, to be marked to his use by the plaintiff's attorney. In the mean time further arrears of ground-rent had accrued to the plaintiff, and judgment obtained therefor against John W. Middleton. The auditor reports no facts to show that Nathan Middleton bargained for an assignment of the judgment, or that any new consideration arose between him and the Fassitts to support an assignment. It is true that the auditor, after finding the facts, speaks *arguendo* of the Fassitts having chosen to sell the judgment to Nathan Middleton, and mark it to his use, and thereby to assign it; and that all their rights passed, including the right to be preferred as claimants in the fund.

In so stating, it is manifest he was declaring his legal conclusions, not the facts derived from the evidence. The facts of the case present simply the payment of the judgment against the bail for stay of execution, entering satisfaction, and thereupon the marking of the original judgment by the plaintiff's attorney for the use of the bail.

The judge in the court below placed considerable stress on the ground that an attorney has no power to assign his client's judgment. Clearly, he has no power after judgment to make such an assignment of it, to one who pays it because he is liable to pay, as will continue the judgment to the prejudice of his client's rights in other respects: *Campbell's Appeal*, 29 Pa.

St. 401 [72 Am. Dec. 641]; *Stackhouse v. O'Hara*, 14 Id. 89. How far he may transfer it by marking it to the use of the bail who pays it, so as to enable the bail to proceed against his principal for the purpose of reimbursing himself, it is not necessary to decide. Granting that he may do so, this alone would not interfere with the claim of the ground-rent owner to the fund, for his right takes effect by relation back to the date of the deed by which the rent was reserved. The marking of the judgment to the use of the bail in order to overreach the claim of the ground-rent owner must be accompanied by another incident, to wit, that of estoppel; for the judgment being posterior in right to the ground-rent, the owner of the latter can only be postponed by some act which led the assignee of the judgment to rely on it in confidence to secure the payment of the subject of the assignment. This could only be by an express agreement to guarantee, or some stipulation requiring postponement in order to effectuate its purpose. While every assignment imports a warranty of title, and that the assignor has done no act to defeat recovery, it does not imply a guaranty of collection or of the lien as primary. If there be no fraud or misrepresentation as to its priority of lien, certainly an assignor is not to be held by reason of his assignment to have undertaken that the judgment is prior to all other liens. He is only responsible for the sale of a sound debt, unimpaired by secret defenses, payment, or other matter which would render it invalid. But certainly, as himself the holder of a prior encumbrance of record, independent of the subject-matter assigned, there can be no legal presumption or equitable estoppel which can hold him liable to be postponed upon his superior lien, as in this case, without any new consideration or express contract.

We have the benefit of a decision upon this principle in two cases much stronger than the one before us. A mortgagee held seven bonds payable annually in succession secured by one mortgage. He assigned the first four, retaining the three last due. The mortgaged premises being sold at sheriff's sale for less than the whole amount of the mortgage debt, it was held that the assignor was entitled to come in upon the fund *pro rata* with his assignees, there being no guaranty in fact, and the law implying none by the assignment: *Donley v. Hays*, 17 Serg. & R. 400. In the next case the mortgagee assigned three out of seven bonds, secured by the mortgage with a guaranty of payment, the mortgage not then being recorded.

He afterwards put his mortgage upon record, and then assigned the remaining four bonds. The court below held the mortgage to be a security for all the bonds, and distributed the proceeds of the sale of the mortgaged premises among all the bond-holders *pro rata*. This was affirmed: *Betz v. Green*, 1 Penr. & W. 280. These cases have been reaffirmed in *Hancock's Appeal*, 34 Pa. St. 155.

As long ago as the case of *Cummings v. Lynn*, 1 Dall. 444, it was held that "the covenant implied by the word 'assigned' extends only to this, that the assignee should receive the money from the obligor to his own use; and if the assignor should receive it, then he would be liable over for it." See also *Elliot v. Miller*, Addis. 269; *Folwell v. Beavan*, 13 Serg. & R. 311, 316.

From these principles it will be seen that, admitting the power of the attorney to mark the judgment for the use of the bail, upon his making a voluntary payment of the debt, there is no legal effect to be attributed to the act of assignment, which can be presumed to run back to the distinct and independent claim of the plaintiff in the judgment upon the reservation in the ground-rent deed, and postpone this superior lien to that of the judgment thus assigned.

The judgment of the court below is therefore affirmed.

STRONG, J., did not sit in this cause.

ASSIGNMENT OF JUDGMENT BY ATTORNEY: See *Head v. Gervais*, 12 Am. Dec. 577, and note 582; *Boren v. McGhee*, 31 Id. 695; and *Campbell's Appeal*, 72 Id. 641, and note.

McCARTY v. KITCHENMAN.

[47 PENNSYLVANIA STATE, 239.]

RIGHT TO USE ALLEY RUNNING BETWEEN TWO LOTS OF LAND, and from one street to another, and between other lots of land, such alley having been dedicated to the use of lot-owners by a former owner of the property, constitutes an easement which, if continuous, will not be extinguished by merger of the title of the said two lots in one owner, but will pass to purchasers and holders of other lots upon the alley; and the purchaser of such two lots will have no right to close the alley, though the measurements in his deeds extend to the center of the alley, and embrace the whole of it between his lots; but the consent of all the owners of lots bounding on it will be necessary to authorize it to be closed.

TRESPASS on the case. The opinion states the facts.

J. P. O'Neill and William L. Hirst, for the plaintiff in error.

A. S. Letchworth, for the defendant in error.

By Court, READ, J. A four-foot-wide alley had been laid out in 1831 by the owner of the whole ground through which it ran, from Fourth Street to Charlotte or Pink Street, for the accommodation of the lots on its north and south sides. It was distinctly recognized as an existing alley in a deed from Samuel Paynter (the original owner of all the ground) and wife to John Fitzgerald, dated the 19th of July, 1831, and duly recorded, conveying the lot on its north side to Fitzgerald, he being then the owner of the lot at the northeast corner of Master and Fourth streets, over the northern part of which this alley was extended into Fourth Street. The defendant below derived his title to the two lots, conveyed to him by Robert Scott, administrator of David Scott and John Scott, from Fitzgerald, under whom his grantors claimed. In 1843 David Scott and John Scott purchased the large lot on Fourth Street, extending through to Charlotte Street, on the north side of this alley, and in 1844 the lot on the northeast corner of Fourth and Master streets, fourteen feet front on Master Street by fifty feet in depth on Fourth Street. The title to the lot of the plaintiff below was also deduced from Samuel Paynter to David Scott, who purchased it from Ann Nice, to whom it had been conveyed by Sheriff Porter, by deed dated the 25th of July, 1844, having been sold by him as the property of John Fitzgerald.

Upon the lot at the northeast corner of Fourth Street there was at the time of the purchase by the Scotts a two-story brick messuage or tenement, with a two-story brick kitchen; and there appears also to have been at the time of its purchase by them a messuage or tenement on the lot to the east of it, which is the one owned by the plaintiff. After the purchase by the Scotts of the corner lot, and of the lot on the north side of the alley, it would appear that they erected on the north lot a three-story double brick messuage, which extended in its second and third stories upon the south and corner lot the distance of eight feet, making the front on Fourth Street twenty-three feet two and a half inches.

David Scott having died, by an order of the orphans' court for the city and county of Philadelphia the undivided moiety of the decedent in these three lots was sold at public sale on the 18th of October, 1859; and the surviving brother sold his

interest at the same time, the purchaser thus obtaining title for the whole. The defendant purchased the north lot and the corner lot described as No. 1, but with separate descriptions and a *nota bene*, showing the manner in which the three-story messuage was extended, as above stated, eight feet on the corner lot on the south. The plaintiff purchased the lot to the east of the corner lot, described as No. 2, containing in front, on said Master Street, fourteen feet, and extending of that width in depth forty-eight feet to a four-foot-wide alley.

It is clear, therefore, that both parties purchased these lots with a full knowledge that there was a four-foot-wide alley running from Fourth to Pink street, laid out by the owner of the whole ground twenty-eight years before, and recognized in the deeds which formed the muniments of their title, and by the archway made by the Scotts, and which neither they nor any other person could close or obstruct without the consent of all the owners of the lots bounding on it. The obstruction complained of being a gate put upon the Fourth-street end of the alley by the defendant, shows it was in use when the Scotts were the owners of the three lots, and that they never pretended to have a right to close it. The plaintiff purchased with his lot the right to use this alley, and the defendant purchased his lots with a full knowledge that they were sold to him subject to this easement. This statement of the facts disposes of the whole case. It was both a continuous and an apparent easement.

But it is perhaps proper to notice some of the authorities on this subject, as we might otherwise be supposed to have overlooked them. The case of *Kieffer v. Imhoff*, 26 Pa. St. 438, appears to be completely in point, and the statement of Chief Justice Lewis (page 445) covers this case completely, with this addition, that here it was not in the power of the Scotts to have closed this alley. *Maynard v. Esher*, 17 Id. 222, arose upon an alleged easement of light and air, and if it conflicts with *Kieffer v. Imhoff*, 26 Id. 438, the latter is the better law. *Pyer v. Carter*, 1 Hurl. & N. 916, was the case of a drain which was held to pass with a house without any express grant for that purpose. In *Ewart v. Cochrane*, 7 Jur., N. S., 925, Lord Campbell, in the House of Lords, quotes this case approvingly; but I am aware that in *Dodd v. Birchall*, 8 Id. 1181, a few months afterwards, Martin, Baron, said: "On the other point I have already said that I think the case of *Pyer v. Carter*, 1 Hurl. & N. 916, went to the extreme verge of the

law." The case of *Pyer v. Carter*, *supra*, was recognized by the master of the rolls in *Suffield v. Brown*, 9 L. T. 192; but Lord Chancellor Westbury, in the same case on appeal, Id. 627, in the present year, says of it: "I cannot look upon the case as rightly decided, and must wholly refuse to accept it as authority." But he expressly says: "To the earlier cases cited in *Pyer v. Carter*, 1 Hurl. & N. 916, as authorities for its decision there can be no objection." In the case before him the lord chancellor was clearly right in dissolving the injunction, the whole easement claimed by the vendor arising from the fact that he had been in the habit of allowing the bowsprits of ships in his dock to project over his wharf. It was neither a continuous nor an apparent easement. The lord chancellor indulges in a somewhat damaging criticism upon a portion of Mr. Gale's treatise on easements, but nothing that he has said affects the case before us. Professor Washburn has in his valuable work on easements and servitudes discussed the case of *Pyer v. Carter*, *supra*, or rather quoted it, without the advantage of having seen the observations of Baron Martin and the lord chancellor in the cases just cited.

Judgment affirmed.

WOODWARD, C. J., was absent at *nisi prius* when this case was argued.

EASEMENT OF WAY: See *Pierce v. Cloud*, 82 Am. Dec. 496, and cases in note.

PHILADELPHIA AND TRENTON R. R. Co. v. HAGAN.

[47 PENNSYLVANIA STATE, 244.]

TRAIN SHOULD APPROACH CROSSING OF PUBLIC STREET at moderate rate of speed, and should give timely warning, by whistle or other usual notice, of approach of train, to those lawfully passing along the street; and if by neglect or omission that duty is not fulfilled, the railroad company is liable for injury or death resulting therefrom, unless it be affirmatively shown that ordinary care was not taken by the party injured to avoid the accident.

IF ASSUMPTION IN POINT PRESENTED BY ONE PARTY and affirmed by the court is untrue in fact, the court should be requested by the other to charge upon the true state of facts, or at least upon the latter's hypothesis; and where this is not done, and there is evidence as to the correctness of the assumption, the judgment will not be reversed because of a direction without evidence to sustain it.

JUDGE MAY REFUSE TO CHARGE UPON EFFECT OF GIVEN STATE OF FACTS when the facts are themselves in dispute. It was therefore not error to

refuse to charge the jury that there was no evidence that the accident which was the basis of the action was caused by the sole negligence or want of care of the defendants and his servants, and that the verdict must therefore be in their favor.

CASE by the representatives of John Hagan, deceased, to recover damages for his death, alleged to have been caused by the negligence of defendants' employees, in so managing a train of cars, while crossing a public street, as to run over him. There was a verdict and judgment for plaintiffs, whereupon defendants sued out this writ of error, averring that the judge erred: 1. In affirming the plaintiffs' third point; 2. In affirming the plaintiffs' fourth point; 3. In refusing to charge the jury as requested in defendants' first point. The third point of instruction requested by plaintiffs and given by the court was as follows: "If the whistle of the engine was not sounded, nor any other usual notice given of the approach of the train, the deceased had a right to presume that the track was clear, and unless the jury are satisfied by affirmative proof that the deceased did not use ordinary care, the defendants are liable for the consequences of the injury." The instruction requested in plaintiffs' fourth point and given by the court was as follows: "The employees of the train of the defendants were required to approach the crossing of a public street or highway (where the injury complained of occurred), at a moderate rate of speed, and to give timely warning to travelers and pedestrians lawfully going upon, or over, or across the public street or highway. And if the plaintiffs have shown that by neglect or omission on the part of those having charge of the train their duties were not fulfilled in this case, the defendants are liable, unless it be shown to the jury affirmatively that ordinary care was not taken by deceased to avoid the accident." The instruction asked for by defendants in their first point and refused by the court was as follows: "There is no evidence that the accident was caused by the sole negligence or want of ordinary care on the part of defendants acting by their servants, and therefore the verdict must be in favor of the defendants."

Emanuel Rey, for the plaintiffs in error.

Daniel Dougherty, for the defendants in error.

By Court, THOMPSON, J. We have looked closely into this record, because it seems to us, upon the whole evidence, such a verdict was scarcely justifiable. We are not, however, able

to discover any solid ground for the reversal of the judgment. Doubtless there were features of characteristics apparent in the trial not perceptible to us now, otherwise it is presumable the learned judge below would have set aside the verdict and granted a new trial. Be that as it may, we have only to deal with the assignments of error now before us.

The first and second specifications are not sustained. The court, we think, could not have negatived the points out of which they arise without error. It is true, there is an assumption in the fourth point that the injury to the deceased occurred at the crossing of the railroad over a public street or highway. But if this had not been true in fact, it is difficult to understand why the attention of the court was not called to it, with a request to charge on the true state of facts in that particular, or at least on the defendants' hypothesis in regard to it. This was so obviously the duty of the defendants' counsel, and their experience such, that it strengthens much the argument that the assumed fact was exactly true. In looking carefully at the testimony, we cannot say that there was an absence of evidence, as contended for by the counsel for the plaintiffs in error, on this very point, so as to justify a reversal of the case for a direction, without evidence to sustain it. As a general rule, it may be stated that if a fact be assumed in a point, a court commits no error by affirming the point and referring the question of fact to the jury. This is an affirmance of the law, and a reference of the fact to the proper tribunal. Here the objectionable expression in the point was so intermixed with the question of law propounded that it was not separated from it in the answer; but the fact alleged was referred to the jury on the point of the duty of care, and the consequences of its omission by both the company and the deceased. There was, therefore, no error in thus disposing of the point.

It has often been held that it is not error in a judge to refuse to charge on the effect of a given state of facts when the very facts are in dispute: *Brown v. Campbell*, 1 Serg. & R. 176; *White v. Kyle*, 1 Id. 515; *Gelbach's Appeal*, 8 Id. 210. We think, therefore, that the refusal to charge as requested in the defendants' first point was not error, and that the court discharged their duty in referring the contested point therein contained to the jury. It was a controverted question whether there was not concurrent negligence on part of the deceased, if negligence had been shown against the defendants. To this

point there was much testimony. It was right and proper, therefore, on part of the court, to refrain from giving a binding direction on either side of the controversy; either that there was or was not evidence that the disaster was the result of the sole negligence of the servants of the company. The learned judge referred the inquiry in this particular, with unexceptionable instructions to the jury, in substance, that before the plaintiffs would be entitled to recover, it must be made to appear that the injury resulted from the negligence of those in charge of the train, and not from the concurrent negligence of the deceased with that of the servants of the company. We see no error in any portion of the instructions given to the jury, and hence we must affirm this judgment.

Judgment affirmed.

WOODWARD, C. J., was absent at *nisi prius* when this case was argued.

NEGLIGENCE OF RAILROAD COMPANY IN FAILING TO GIVE WARNING OF APPROACHING TRAIN AT PUBLIC CROSSING: See *Milwaukee and Chicago R. R. Co. v. Hunter*, 78 Am. Dec. 699, and note.

CONTRIBUTORY NEGLIGENCE DEFEATS RECOVERY WHEN: See *Chicago, B., & Q. R. R. Co. v. Dewey*, 79 Am. Dec. 374, and note. The principal case is cited in *Sheff v. Huntington*, 16 W. Va. 317, and *Cleveland & R. R. R. v. Rowan*, 66 Pa. St. 399, to the point that contributory negligence is purely a matter of defense, and the burden of proving it is on the defendant.

PHILADELPHIA AND READING R. R. Co. v. SPEAREN.

[47 PENNSYLVANIA STATE, 800.]

RULES OF RAILROAD COMPANY REGULATING DISTANCE AT WHICH TRAINS SHALL RUN from each other are intended solely for the protection of the property of the company, and the safety of their employees and passengers, and not for persons who may be traveling along the highway; and no inference of negligence can be drawn from the proximity of trains, in an action to recover damages for an injury done to a person while crossing the railroad track at a place not known or used as a public crossing.

RAILROAD COMPANY IS NOT ANSWERABLE IN DAMAGES for injury to five-year-old child, resulting from being struck by one of the company's engines while attempting to cross the track between such engine and a coal train which was running ahead of it, unless there is proof of want of ordinary care in the engineer at the time when and place where the injury occurred.

NO ABSOLUTE RULE AS TO WHAT CONSTITUTES NEGLIGENCE can be laid down; for conduct which might be termed negligent in one case would in another be held to constitute ordinary care; and it is therefore always

a question of fact for the jury, under direction of the court as to the relative degree of care or the want of it, growing out of the circumstances and conduct of the parties.

NOTES OF TESTIMONY TAKEN BY COUNSEL ON FORMER TRIAL of cause between the same parties may be read in evidence, where he testifies that "they contain the whole of the substance of the examination in chief, but that the cross-examination is not so full," and that "he thinks he took down the testimony in chief, and some of the cross-examination,—all that was material."

TRESPASS. The opinion states the facts.

W. B. Wells and C. Tower, for the plaintiff in error.

Franklin B. Gowen, Thomas R. Bannan, and B. Bartholomew, for the defendants in error.

By Court, AGNEW, J. Julia Spearen, a little girl about five years of age at the time of the injury, was returning from school. Instead of going to the proper crossing of the railroad, she went down the track about twenty-five yards below it, and was standing with a little sister beside her uncle, the watchman of the crossing, placed there to guard it.

A coal train was coming down the track of the railroad, and whistled before it came to the crossing. While passing the place where Julia was, she stood beside her uncle near to the track. Immediately behind the coal train, a light engine—that is, one with its tender only—was coming, distant from the hindmost coal-car, as variously stated, from thirty to fifty yards. The coal train was running slowly, and the light engine approaching somewhat faster; but the proof is, that a light engine can be stopped within the length of itself and tender, and this one was thus stopped at the time of the accident. Immediately after the coal train passed, and as the light engine approached, Julia started quickly and ran to cross the track before the light engine. Her uncle and another person near by called to stop her, but she ran forward. Her uncle (the watchman) ran after her, catching her just as the engine struck her, and was himself struck and injured. She was cast forward upon the track, and three of her fingers and part of her hand cut off. On her part, it was alleged the whistle of the light engine was not blown before coming to the crossing above. As is usual in such cases, the plaintiff's witnesses swore that they did not hear the whistle, while those of the defendants' swore it was blown. The plaintiff also alleged that the light engine was within the distance of the coal train forbidden by the company's rules, while the defendants proved that those rules

did not apply to a light engine, which can be safely run "close up." The accident occurred in the daytime.

Upon the undisputed facts the case is simply one of a little thoughtless child running suddenly to cross before an engine at a place where the engineer would not expect it, and being knocked down and injured before the engine could be ordinarily stopped. The place where the child stood, the short distance she had to run, the striking of her and of the watchman also, just as they reached the track, and the slow rate at which the engine was running after the coal train, are facts which in themselves indicate the nature of the case, and prove that the disputed fact, whether the engine whistled before it came to the crossing, could have had nothing to do in causing the injury. On the contrary, the fact that the passengers along the highway, and the little girl herself, who stood beside her uncle, had all been arrested by the passing train, while the light engine was immediately in the rear of it in full view from the track to any one attempting to cross it, and the calling of the watchman and the person near to him to prevent Julia from crossing, all show that her act was one of childish thoughtlessness and heedlessness, entirely disconnected from the omission to whistle before crossing the highway and the distance between the trains.

Under these facts, it is very clear that being where she had no right to be, and darting headlong before the engine, had she been an adult of discretion there could be no right of recovery. But being a child, the same degree of caution would not be required of her, and the case would turn upon the conduct of those in charge of the engine which did the injury. The act of the child being the immediate cause of her own injury, it is not the remote negligence of the company we must look to, but the proximate,—that is, the conduct of the engineer upon the engine at the time of the injury. Hence, the omission to whistle before crossing, or the relatively unsafe distance between the engine and the train before it, cannot determine the case. They did not contribute to the accident, and are no part of the company's neglect of duty to this particular party under the circumstances. The injury was not at the crossing, but below it, where the plaintiff had no right to be, and where there was no duty upon the engineer to suppose she would be. The engine was in full view to any one attempting to cross, and within a few feet of the train which had already arrested the plaintiff's attention and pre-

vented her from crossing. The danger of crossing just before the engine was visible to any one possessing ordinary discretion, and those near to her saw it. She suddenly ran upon the track, and was struck just as she reached it. No time was left to those upon the engine to guard against the injury. The suddenness, shortness of time, and unexpectedness of a child's appearance before the engine made it exceedingly difficult, perhaps impossible, to avoid the injury.

It is manifest that it was not the small distance between the engine and the train which was the cause, but the want of discretion in the child. It is the right of the company to run its trains as far apart or as close as it may choose; for its use of its own road is its right. The rule which forbids approximation of trains too closely is for the protection of themselves, and the property and persons they carry, not a rule having respect to those who travel the highway. For them it is sufficient to be warned of the passing train. A passenger upon the train may well complain of a breach of a rule as to distance of interval made for his protection, because its breach contributes to his injury. But here the distance between the engine and the train had nothing to do with the right of those crossing the track. If the traveler has notice, and sees the train or engine, it is his duty to stop,—if he cannot pass safely. If he sees two trains, he must stop till both have gone by. He cannot, because one has passed him, throw himself into the very jaws of danger, and then claim compensation for his rashness on the ground that the interval was unsafe as between the trains themselves.

The question here is, Was the company by its agents guilty of any breach of duty to the plaintiff when crossing the track? If nothing was done by the person controlling the engine to cause the injury, no cause of action can arise. Nothing is better settled than the right of railroad companies to the lawful use of their roads without let or hindrance of those who have no right to interrupt or molest their enjoyment: *Railroad Company v. Skinner*, 19 Pa. St. 298 [57 Am. Dec. 654]; *Stucke v. Milwaukee & M. R. R. Co.*, 9 Wis. 202, 733; *Railroad Company v. Norton*, 24 Pa. St. 465 [64 Am. Dec. 672]; *Philadelphia and Reading Co. v. Hummell*, 44 Id. 375.

The engine in this case having safely passed the crossing appropriated to travelers, the engineer was under no duty to suppose any one would attempt to cross the track suddenly right in front of the engine. He had a right to suppose a clear

track, and was not guilty in failing to use precaution where he had no reason to expect interruption. Nor is the company responsible for the private arrangement of the uncle with the mother of the child to see it across the road at the crossing. It is the duty of parents in the vicinity of a railroad to see to the safety of their little children. It is only out of a breach of duty as the watchman at the crossing that a liability could arise; not out of his superadded promise to the mother as a relative. His taking charge of the little girl would therefore create no liability, unless it further appeared that he had done or omitted to do an act contrary to his duty as a watchman, which caused or led to the injury.

In view of these principles, and looking to the facts of the case, we think there was error in the charge. But in justice to the learned judge who tried the cause, it is proper to say, that abstractly he stated the law correctly in the main. Separately taken, it would be difficult to find fault with the propositions stated. But the error lies in the effect of the charge as a whole; in its application to the facts of the case, and in leading the jury to infer and find the remote acts of negligence as the ground of action, instead of narrowing their consideration to the immediate acts at the time of the injury, and its effect in producing an impression that in the case of a child its unlawful acts may not be a ground of defense.

Two legal propositions grew out of the immediate occurrences: the first, as to the degree of caution or prudence required of a child of such tender age; and the second, as to the degree of care and diligence required of the servants of the company.

We agree with the learned judge, it would be a hard rule that would hold a child of five years of age to the same measure of care and diligence in avoiding the consequences of the neglect or unlawful acts of others which is required of adults. There is authority for this: *Rauch v. Lloyd*, 31 Pa. St. 358 [72 Am. Dec. 747]. In this case it was decided that where a child of tender years attempted to pass under a train of cars negligently left standing on the crossing of a public street, where he had a right to pass, and they had no right to be, and was injured by the starting of the cars, the owners were liable, and the attempt to pass, though recklessness and concurring negligence in an adult, is not such in a child. The same doctrine was held in *Pennsylvania R. R. Co. v. Kelly*, 31 Pa. St. 372. See also *Lynch v. Nurdin*, 1 Ad. & E., 41 Eng. Com. L.

422; *Birge v. Gardiner*, 19 Conn. 507 [50 Am. Dec. 261]; *Robinson v. Cone*, 22 Vt. 213 [54 Am. Dec. 67].

The degree of care required of the servants of the company in such a case is dependent, in some measure, upon the capacity of the injured party. If an adult should place himself upon the railroad where he has no right to be, but where the company is entitled to a clear track and the benefit of the presumption that it will not be obstructed, and should be run down, the company would be liable only for willful injury, or its counterpart, gross negligence. But if a child of tender years should do so, and suffer injury, the company would be liable for the want of ordinary care. The principle may be illustrated thus: If the engineer saw the adult in time to stop his train, but the train being in full view, and nothing to indicate to him a want of consciousness of its approach, he would not be bound to stop his train. Having the right to a clear track, he would be entitled to the presumption that the trespasser would remove from it in time to avoid the danger, or if he thought the person did not notice the approaching train, it would be sufficient to whistle to attract his attention, without stopping. But if, instead of the adult, it were a little child upon the track, it would be the duty of the engineer to stop his train upon seeing it. The change of circumstances, from the possession of capacity in the trespasser to avoid the danger to a want of it, would create a corresponding change of duty in the engineer. In the former case, the adult, concurring in the negligence causing the disaster, is without remedy; in the latter, the child not concurring from a want of capacity, the want of ordinary care in the engineer would create liability. But if the train were upon the child before it could be seen, or if it suddenly and unexpectedly threw itself in the way of the engine, the engineer being incapable of exercising the measure of ordinary care to save it, the child would be without remedy, for the company's use of its track is lawful, and the presence of the child upon the track is unlawful.

There is no absolute rule as to negligence to cover all cases. That which is negligence in one case by a change of circumstances will become ordinary care in another, or gross negligence in a third. It is a relative term, depending upon the circumstances, and therefore is always a question for the jury upon the evidence, but guided by proper instructions from the court. "Duties grow out of circumstances," as it is well re-

marked by Mr. Justice Woodward, in *Reeves v. Delaware, L., & W. R. R. Co.*, 30 Pa. St. 461; and the relative degree of care, or want of it, grows out of the circumstances and conduct of both parties. These principles will be found strongly illustrated in the cases of *Railroad Company v. Norton*, 24 Id. 465 [64 Am. Dec. 672], and *Philadelphia and Reading R. R. Co. v. Hummell*, 44 Id. 375. In the former case, the plaintiff was sawing wood upon a machine fastened to the track, with the permission of the superintendent, and was injured by the train of another company having a right to use the track, the conductor of which knew of the machine being there and was guilty of negligence on the occasion; yet it was held that the plaintiff, being in an unlawful place, was not entitled to recover.

In the latter case the cars were moving slowly by their own gravitation, under the complete control of the engineer, and the plaintiff, a child, was injured by getting upon the track, where it had no right to be, and it was held there could be no recovery. The principles stated by Justice Strong in that case have a strong bearing upon this.

The error the court fell into was, in not confining the attention of the jury to the question of negligence at the time and place of the injury, and in leaving them to understand that a remote negligence, not causing or contributing to the injury, would create a liability to one who trespassed upon the track and caused her own injury "by suddenly darting out (to use the language of the judge) to pass the track, probably without knowing or heeding that the engine was coming." The impression would be deepened by the closing part of the charge, wherein the jury were told, "whether Julia Spearen was on the track by the request of the company's agent, or there without right, if the child exercised such prudence as could be reasonably expected from one of her tender age, the company are not excused from the consequences of any injury arising from the negligence of their servants."

The defendants also excepted to the admission of the testimony of James Geary, read from the notes of Mr. Bannan, taken at a former trial. We see no error in the admission of Mr. Bannan's notes upon the corrected statement of his testimony found in the paper-book of the defendant in error. It is clearly within the rule stated in *Cornell v. Green*, 10 Serg. & R. 14; *Chess v. Chess*, 17 Id. 409; and *Rhine v. Robinson*, 27 Pa. St. 30. Indeed, the testimony of Mr. Bannan as to his

notes is more satisfactory than that of Mr. Parker in the case last cited.

The objection chiefly urged in the argument was that Mr. Bannan's statement that he took down all of the cross-examination that was material was the substitution of his opinion only for the fact of materiality, notwithstanding he said it was a fact, not an opinion. But the same feature is observable in the testimony of Mr. Forward, in *Chess v. Chess*, 17 Serg. & R. 409, and of Mr. Parker, in *Rhine v. Robinson*, 27 Pa. St. 30. Mr. Forward said: "I may have omitted what I supposed to be immaterial to the issue trying." Parker said: "My belief is I have the substance of all the witness said that I deemed material to the issue on my notes." He had also said: "I have no particular recollection of how much cross-examination I took in the case."

It is certainly true that to some extent this is submitting the materiality of the testimony to the opinion of the note-taker, but not to an extent more injurious than the total loss of all such testimony would inflict. Clearly, if it appeared that the person taking the notes culled the facts testified to, taking down those he deemed material, and omitting those he thought immaterial, his notes would not be received, for he would not be giving us the true substance of the testimony. But if he gives us the substance, though he cannot say he has taken down every expression of the witness, and may have omitted language that seemed immaterial, there is not such an apparent loss of substance as justifies a rejection. If we insist upon a rigid observance of everything said which tends to develop the testimony according to its precise truth, the notes must always be rejected, unless taken in short-hand when both question and answer are noted; for it is a well-known fact that without the question as well as the answer the precise meaning of the witness is often lost. Every one experienced in taking testimony is also aware that many questions are answered by a mere affirmative or negative, and in taking down the testimony in the form of a statement, as is usually done, it is therefore the language of the question which is really taken in the form of an answer. A very large portion of all notes is of this character, yet no one has ever thought it a solid objection to receiving the notes. The substance is not the words identically, but the substantial expressions of the witness, and must admit of some change from the mouth to the paper. The substitution of the notes for the lost testimony

of the living witness is a necessity, that all may not be lost, though something may be. To say that the notes must be a perfect transcript of the language is to reject all secondary evidence of the testimony. We must trust something to the judgment of the court trying the cause to see to it that the notes come with a measure of proof that is likely to furnish all that was material in the testimony. We think in this case they were properly admitted.

Judgment reversed, and a venire *de novo* awarded.

WOODWARD, C. J., dissented.

THOMPSON, J., was absent at *nisi prius* when this case was argued.

DUTY OF RAILROAD COMPANY TO PERSONS CROSSING TRACK: See *Railroad Company v. Skinner*, 57 Am. Dec. 654; *Railroad Company v. Norton*, 64 Id. 672; and *Philadelphia & T. R. R. Co. v. Hagan*, *ante*, p. 541, and notes. The duty depends upon circumstances and the relation of the parties: *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 273, citing the principal case. In *Bellefontaine R'y Co. v. Hunter*, 33 Ind. 359, also citing the principal case, it was held that if a person was crossing the track ahead of a train, and the engineer saw nothing to indicate that he would be unable to get safely across before the train reached him, he would not be bound to stop his train.

DEGREE OF CARE ESSENTIAL TOWARD CHILDREN OF TENDER YEARS: See *Rauch v. Lloyd*, 72 Am. Dec. 747, and cases collected in the note.

SHAMOKIN VALLEY R. R. Co. v. LIVERMORE.

[47 PENNSYLVANIA STATE, 465.]

TOWN LOTS HELD BY RAILROAD COMPANY DO NOT PASS BY SHERIFF'S SALE under mortgage of the road, "with its corporate privileges and appurtenances," unless directly appurtenant to the railroad and indispensably necessary to the enjoyment of its franchises; and the question of appurtenancy and necessity is properly referred to the jury as a fact to be determined by them.

EJECTMENT. The opinion states the facts.

Joshua W. Comly, for the plaintiffs in error.

James Pleasants, for the defendants in error.

By Court, AGNEW, J. This was an ejectment in the court below, in which Alonzo Livermore and James Malone were the plaintiffs, and the Shamokin Valley and Pottsville Railroad Company and others were the defendants. It was brought for sixteen lots in the borough of Sunbury.

The Danville and Pottsville Railroad Company was incorporated in 1826, and in 1828 was authorized to construct a branch railroad to the Susquehanna, at or near the town of Sunbury. The sixteen lots in question were conveyed to this company early in the year 1835. The intention of the company was to use them for a basin for shipping coal.

In 1841, judgments were entered against the company, and they finally became insolvent. In 1848, these sixteen lots were sold to Reuben Fagely at sheriff's sale, under a judgment in favor of one Gontheimer against the company, obtained in 1841. The deed was acknowledged by the sheriff at November term, 1848, without objection.

The commonwealth having become interested in the affairs of the company by a guaranty of interest upon loans to the company, amounting to three hundred thousand dollars, in consequence of the insolvency of the company, passed three several acts in 1846, 1847, and 1850, for the sale of their railroad, and all their property and franchises. Sales could not be effected under the acts of 1846 and 1847, but finally a sheriff's sale was effected under the provisions of the act of 1850, amendatory of the former acts. The purchasers became incorporated, finally taking the name of the Philadelphia and Sunbury Railroad Company.

Reuben Fagely, the purchaser of the sixteen lots, sold them to the Philadelphia and Sunbury Railroad Company, by deed dated June 17, 1854.

Alonzo Livermore obtained judgment against the Philadelphia and Sunbury Railroad Company, in 1857, upon which executions were issued and levied on the sixteen lots, that were sold in January, 1858, to Charles J. Bruner and James Pleasants, and the deed acknowledged on the 16th of January, 1858.

It is under this sheriff's sale to Bruner and Pleasants, the plaintiffs below, Livermore and Malone, claim the title to these lots as the former property of the Danville and Pottsville Railroad Company, through the sale to Fagely, who conveyed to the Philadelphia and Sunbury Railroad Company, the purchasers of the railroad and other property of the Danville and Pottsville Railroad Company.

The Shamokin Valley and Pottsville Railroad Company, one of the defendants below, claim the title to the lots in question thus: The act of June 15, 1852, authorized the Philadelphia and Sunbury Railroad Company to borrow eight hundred thousand dollars, and secure the same " by a mortgage of the

railroad, with the appurtenances, and the corporate rights and privileges of the company, together with such other property as may be conveyed to them in trust for the security of said loan."

Under this act, the Philadelphia and Sunbury Railroad Company executed a mortgage for five hundred thousand dollars to Joseph R. Priestly. This mortgage grants "the railroad of the said company from its terminus at Sunbury to its intersection with the extension of the Mine Hill and Schuylkill Haven Railroad as aforesaid, with its corporate franchises and appurtenances, together with its locomotive engines and cars, and also all those several tracts of land situate, lying, and being," etc.

Proceedings by *scire facias*, judgment, and execution took place under this mortgage, by virtue of which the mortgaged premises were sold in November, 1857, to Edward S. Whelan, and a sheriff's deed to him acknowledged on the 5th of November, 1857. Whelan, by deed dated the 9th April, 1858, conveyed the premises purchased to the Shamokin Valley and Pottsville Railroad Company, which had become incorporated by act of March 25, 1858, for the purpose of taking the title and the railroad and franchises of the Philadelphia and Sunbury Railroad Company.

From this concise statement of the titles of the parties, it will be seen that the controversy arises between the title to those lots as held by the Philadelphia and Sunbury Railroad Company, under their purchase from Reuben Fagely, and the title conveyed to them under their mortgage to J. R. Priestly.

If the title passed under their mortgage to Priestly, then Livermore and Malone, the plaintiffs below, had no title, and ought not to have recovered. If it did pass by the mortgage, it must have done so under the terms "corporate franchises and appurtenances," for the lots as such were neither named nor described in any manner whatever. But these lots never were made appurtenant in the legal sense to the railroad by any grant, deed, writing, or act in the law capable of so doing; and land as such, though it may be the subject of an easement or servitude, cannot of itself be appurtenant to other land, except by incorporation; and then the operation is by union of identity, and not by servitude.

If the title passed by the mortgage, it must have done so under the terms "corporate franchises." But land in itself

is not a franchise: it is an absolute tenement; a corporeal thing. Franchise is an incorporeal hereditament, the seventh enumerated by Blackstone in his Commentaries (vol. 2, p. 37), stated by him to be synonymous with liberty, and defined to be "a royal privilege, or branch of the king's prerogative subsisting in the hands of a subject." See also Tomlin's Dictionary and Hotthouse's Dictionary, tit. Franchise.

In this state the commonwealth stands in lieu of the monarch, and franchise here is a liberty proceeding from her. It is not the right to hold land and tenements, or incorporeal hereditaments connected with lands, for this right belongs to the citizen, independently of the sovereign. The ordinary franchise of a railroad company, therefore, is by virtue of the sovereign power of eminent domain, to condemn, take, and use lands for the purpose of a public highway, and to take tolls from those who use it as such.

The charter of the Danville and Pottsville Railroad Company gave them authority "to purchase, receive, have, hold, and enjoy to them and their successors, lands, tenements, and hereditaments, goods, chattels, and all estate, real, personal, or mixed, of whatever kind or quality soever, and the same from time to time to sell, mortgage, grant, alien, or dispose of, and to make dividend of such portion of the profits as they may deem proper." The authority to hold real estate was not confined to the mere purposes of a railroad, or so much only as was necessary therefor.

When the sixteen town lots were conveyed to this company in 1835, they did not become *ipso facto* a subject of franchise, — they were not by the act of purchase incorporated with the railroad franchise. They came by purchase under the authority contained in the charter, and were not condemned for railroad purposes.

Thus it is clear beyond controversy, that before these lots could become incorporated with the ordinary franchise of the company, it needed some definite, clear, and well-defined acts of the company to produce the incorporation. This was an act outside of the deed of purchase, and was therefore a distinct fact, to be submitted to and found by a jury before any incorporation with this franchise could be pronounced as a legal conclusion by a court.

Now, as the Danville and Pottsville Railroad Company held these lots by deed independently of their railroad franchise, and as they had the power of drawing profits and of selling as

a natural person might, it follows that *prima facie* there was a right to levy the property in executions, and sell it for the debts of the company, and a good title would pass unless the fact of incorporation with the franchise, and a consequent subordination thereto, could be shown to have preceded the levy and sale. The case was therefore clearly one which turned upon this question of fact.

It is not to be doubted that when land becomes subject to a franchise by subordination to it, as essential or proper for its enjoyment, it becomes incorporated with it, and the land will pass with the franchise under a sale of the franchise. There could be no doubt in this case that if these lots had become subordinated to the railroad, so as to effect incorporation, the mortgage of the Philadelphia and Sunbury Railroad Company to Priestly would pass the title to them under the terms "corporate franchises."

The true question, therefore, before the jury was, whether by the acts of the Danville and Pottsville Railroad Company before the levy and sale to Fagely, or by the acts of the Philadelphia and Sunbury company after their purchase from Fagely, these lots had been subjected to the railroad franchise, and thus incorporated with it.

Before examining this question in the light of the facts, it will be proper to notice for a moment the principle of subservience to the franchise which subordinates land to it so as to carry it with the franchise in the sale of it.

A number of cases have been decided in reference to taxation in which this principle has been commented upon.

In *Lehigh Coal and Navigation Company v. Northampton County*, 8 Watts & S. 834, the bed, berme-bank, and tow-path of a canal, and the toll-houses and collection-offices belonging to it, were held to be not taxable, on the ground that they were "necessary in order to make the canal answer the purposes of its construction."

Justice Burnside, delivering the opinion of court in *Railroad v. Berks County*, 6 Pa. St. 70, held: "It is only such property belonging to corporations, and is appurtenant and indispensable to its construction and fitting it for use, that can claim to be exempt from taxation. In the case before us, it is not enough that is a convenient possession, or that it affords facilities in carrying on the business of the company." The court therefore held that warehouses, coal-lots, coal-shutes, machine-shops, wood-yards, and such places form no part of the con-

struction of the road, and were taxable. Justice Rogers, in *Schuylkill Navigation Company v. Commissioners Berks County*, 11 Id. 202, held a toll-house of a canal was not taxable, because it was "a constituent part of the canal, necessarily incident thereto, within the meaning of the decisions already cited."

So also reservoirs to feed a canal were held to be exempt from taxation, because "they are an inseparable incident and appurtenance to the construction of the canal, and clearly embraced within their corporate privileges": *Wayne County v. Delaware and Hudson Canal Company*, 15 Pa. St. 331.

New York and Erie Railroad Company v. Sabin, 26 Pa. St. 242, was decided on the peculiar features of a law levying a tax of ten thousand dollars on the company, and the fact that the special verdict found that the machine-shops, foundries, etc., were charged in the cost of construction. The case is expressly put on this ground by Woodward, J.

In *Westchester Gas Company v. County of Chester*, 30 Pa. St. 232, Porter, J., delivering the opinion of the court, after examining the cases before decided, says: "The principle which pervades the law thus established is the indispensability of the exempted property to the other privileges granted by the legislature." He therefore held that dwelling-houses erected for the residence and accommodation of the hands of an incorporated gas-works were taxable, and its works only exempted.

In reference to a levy and sale by exemption we have but few cases. *Ammant v. Pittsburgh etc. Turnpike*, 13 Serg. & R. 210, merely decided the general principle, that a turnpike road, with its toll-houses, cannot be sold under execution. *Susquehanna Canal Company v. Bonham*, 9 Watts & S. 27 [42 Am. Dec. 315], decided that a toll-house and the lot belonging to it could not be sold under execution. Sergeant, J., stated the principle at the bottom of the decision, "that the franchises and corporate rights of the company, and the means vested in them, which are necessary to the existence and maintenance of the great public object for which they were created, are incapable of being granted away and transferred by any act of the incorporation itself, or by process of another against it *in invitum*."

The last case is so recent, so full to the point, and states the law with so much accuracy, and covers the whole ground of this case so clearly, I prefer to use the language of the judge delivering the opinion of the court, the present Chief Justice

Woodward. "What," says he, "was the effect of the sheriff's sale on the company's title? They had very express authority by the incorporating law to buy, hold, mortgage, and sell lands; and in locating their road, they probably found it expedient to buy the Lukens farm rather than pay damages for crossing it. This is often the true policy of railroad companies. But lands so bought and not actually dedicated to corporate purposes are bound by the lien of judgments, and are liable to be levied in execution, and sold by the sheriff in the same manner and with the same effect as the lands of any other debtor. As to land which has been appropriated to corporate objects, and is necessary for the full enjoyment and exercise of any franchise of the company, whether acquired by purchase or by the exercise of the delegated power of eminent domain, the company hold it entirely exempt from levy and sale; and this on no ground of prerogative or immunity, for the company can no more alien or transfer such land by their own act than can creditor by legal process; but the exemption rests on the public interests involved in the corporation."

The learned judge then proceeds to show that a canal basin is no legitimate incident to a railroad, and if a railroad company possess it, it must be from express grant or necessary implication from the express grants. He concludes by stating the principles upon which the case ought to have been tried, and says: "But what portion of the ground had become appurtenant to the road by appropriation, such as we have described, was a question of fact which ought to have been left to the jury. . . . If there even was any appropriation made by stakes or fences or other acts on the ground, the company ought to be able to show it by the most irrefragable proof." Those are the same principles we have already stated as governing this case. Let us test the case by them.

The Danville and Pottsville Railroad Company had full power to buy, hold, mortgage, sell, and dispose of lands, and make dividends of their profits, independently of their railroad; and the power to erect, make, and establish all works, edifices, and devices to such railroad as may by the said company be deemed expedient for the purposes of carrying into effect the objects of their incorporation. The expressed restriction of the charter was, that the company should possess no "liberties, privileges, or franchises but such as may be necessary or incident to the making of the said railroad and the prosecution of the coal trade."

So far as the railroad was involved, its purposes were of a public nature, — the transportation of freight and passengers, — but so far as the company prosecuted the coal trade, it was an object of private gain, not essential to the railroad franchise, and which they might or might not prosecute at pleasure. Now, admitting that the company might, by implication from the language of the charter, establish a basin as a device for the more convenient carrying on of the coal trade, yet it was a work not essential to the railroad franchise involving the public interests, and therefore one company might establish or withdraw at their pleasure. A basin may be very convenient to enable boats to approach a railroad and take freight from its cars, but clearly it does not belong to it, constitutes no essential incident, and therefore, like warehouses, coal-yards, machine-shops, etc., is an independent structure. The exemption, as remarked by Justice Woodward, is not corporate immunity, but rests on the public interests involved in the corporation.

It is not intended in these remarks to deny that actual appropriation of the lots to the purpose of a basin for the benefit of the coal trade would not protect them from execution, but to show that the basin being the subject of a franchise, independent of the public interests involved in the railroad, it falls clearly within the principle stated by Justice Woodward, that if there even were an appropriation of the lots to this use, the company ought to be able to show it by irrefragable proof.

How stood the facts as to an appropriation? These lots were all purchased in 1835. From that time until the date of the mortgage, a period of twenty years, no basin was ever made and used upon them. An excavation was made in two of the lots, and near to the road-bed an excavation had been made to obtain material for the embankment. The road embankment occupied about ten feet along the northern end of twelve of the lots. On one of the lots there had been a car-house, one hundred feet from it a water-tank, and between them a turn-table. A warehouse was moved up from the railroad upon one corner of one of the lots. There had also been some trestle-work extending over upon one of the lots, from which coal was dumped. Fish, the superintendent, says there never was a complete basin for shipping coal since he knew it. But he states that the road has been extended to a basin and locks into the river above town. The lock was commenced in 1853 and finished in 1855. This was done under the act of

the 2d of April, 1858, authorizing the Philadelphia and Sunbury Railroad Company to change the terminus of their road, and construct a basin on the river for the shipment of coal.

This company paid taxes on the lots in 1855 and 1856; before that, Fagely had paid taxes on them. These facts prove very clearly, that while it probably was the intention of the company at some time or other to establish a basin on these lots, the actual appropriation never was finally made.

In connection with this evidence, the duties and liabilities of the Danville and Pottsville company, and its immediate successor, strongly establish their failure to appropriate. The charter of the first-named company required them to commence the work within three years, and complete it within seven. It further provided, that "if after the completion of the said railroad the said corporation shall suffer the same to go to decay, and be impassable for the term of two years, then this charter to become null and void."

The act of April 14, 1828, extended the time, by authorizing the work to be commenced in three, and completed in seven, years from the date.

The state being liable upon her guaranty for interest on loans to the company by the act of April 21, 1846, authorized the railroad and franchises to be sold at sheriff's sale, and gave the purchasers five years from the acknowledgment of the deed to complete.

The act of March 16, 1847, varied the terms of the act of 1846, and again authorized a sale.

No sale being effected, then came the act of April 2, 1850, which is important as showing that the company had failed in every particular to accomplish the purposes of its charter. It recites the state guaranty of interest and the mortgage for the loans, amounting to three hundred thousand dollars, that the company constructed ten miles of road from the eastern terminus, which they have permitted to go to ruin, and twenty miles from Sunbury to Shamokin coal-field, of which they have practically abandoned all care; that the company is insolvent, and there is no reasonable prospect they will ever complete their railroad, and relieve the state of an annual drain of fifteen thousand dollars. That the railroad is yearly decreasing in value, and in a year or two will be useless for all purposes of transportation, and an immediate sale is therefore necessary. The act then provides for making a sale of the railroad and franchises, and closes with this proviso:

"That nothing contained in this act shall be held, taken, or construed to interfere with or affect the title of Reuben Fagely in and to certain lots of ground in the borough of Sunbury, sold by the sheriff of Northumberland county as the property of said railroad company, and purchased at said sheriff's sale by the said Reuben Fagely; nor shall any sale under the provisions of this act or any of the acts herein referred to be held to divest the title of the said Reuben Fagely, his heirs and assigns, in and to said lots."

By the terms of this act the proceeds of sale were to be paid to the loan-holders, and the mortgage was to be satisfied. The sale was limited to a sum not less than one hundred and thirty thousand dollars, and the state to become responsible for the interest upon the residue of the loan unpaid by the sale. The loan-holders' assent was to be obtained by the auditor-general.

By the act of April 12, 1851, we learn that all this was done,—creditors' assent obtained, sale made, and the state provided for the issuing of certificates for the residue of interest.

These acts contain pregnant evidence that these lots had never been actually appropriated. All parties interested united in so considering it. The state was deeply interested, yet she recognized the sheriff's sale to Fagely, and provided that the sale under the act of 1850 should not affect his title. The creditors by their assent to the act did the same. The railroad company did the same, having permitted the sale of the lots to Fagely without objection. The company was bound to speak out at the time of acknowledgment of the sheriff's deed. They also acquiesced in the sale under the act of 1850. And lastly, the Philadelphia and Sunbury company, as purchasers under the act of 1850, were bound by its terms; and by their after purchase of the lots from Fagely, whose title is referred to in the act, gave unquestionable evidence of their understanding of the facts, and the reasons which led to a saving in the act of Fagely's title.

The point of these remarks is, not to show a ratification of a void sale, but by the united conduct and understanding of all the parties that no actual appropriation of the lots to the basin had ever been fully made, and therefore that the sale was not void, but valid.

The facts of the case, when properly viewed, prove most conclusively there never was such an actual appropriation or

subordination of these lots to the purchase of the company as prevented their levy and sale, held as they were by purchase independently of the franchise for railroad purposes.

But the case is susceptible on its facts of being presented in a still stronger light. Admitting, for the sake of the argument, that the lots were purchased for the purpose of establishing a basin, that the company took steps toward its construction, and carried their design into part execution, it is still a case when the sale must now be supported, and the Philadelphia and Sunbury company, as purchasers under the act of 1850 and of Fagely, are estopped from denying its validity.

The recital of the act of 1850 shows clearly that the Danville and Pottsville Railroad Company had failed to comply with its charter, and the supplement of 1828, which extended the time for completion until 1835. The company was at the mercy of the legislature, and had, besides, become totally insolvent, and incapable of finishing its work. Still, they were permitted to struggle on until 1846, when the legislature, in authorizing the sale of the railroad and franchises, offered, by a proviso in the act of 1846, a further indulgence, that if four hundred thousand dollars of new stock were raised the sale should not take place, and the company should be allowed three years more to complete the road. This was not done, and the act of 1850 was passed. The company could not help itself, and, as between the state, the creditors, and the purchasers under the act of 1850, this act created a contract. The commonwealth and creditors gave their express assent to the sale upon the terms of the act, while the act itself gave to the terms the sanction and the operation of law. The purchasers who bought under the terms of the act became, by the act of purchase, bound by its provisions. Now, by the express terms of the law, nothing contained in it was to be construed to interfere with or affect Fagely's title, nor should a sale under it be held to divest this title. This was not merely a recognition that Fagely had a title, but a stipulation that the purchaser under the law should take nothing in prejudice of his title. When the Philadelphia and Sunbury Railroad Company purchased, they assented to this stipulation. The commonwealth having the power to relinquish her title by forfeiture, and to ratify acts, however inconsistent with the public franchise she had granted, the creditors having assented, the Danville and Pottsville Railroad Company being

unable to dissent, and not having dissented, from the sale, and the Philadelphia and Sunbury having given its assent by purchasing under the terms proposed, and afterwards purchasing from Fagely, the latter company must clearly be estopped from asserting the invalidity of Fagely's title.

The case then came down to the time of the Philadelphia and Sunbury company. Did this company appropriate those lots to the purpose of a basin? Of this there is not a particle of evidence. On the contrary, the company procured legislation to change the termination of the road and make a basin for shipping coal into the river; and besides, suffered themselves to be assessed and to pay taxes on these lots independently of the railroad.

There can be no pretense, therefore, upon the whole case, that these lots were a part of the franchise when the mortgage to Priestly was made. The finding of the jury separated the part actually used for the track of the road and left it in possession of the defendants below. This is all they could ask under the evidence.

The judgment must be affirmed.

WOODWARD, C. J., dissented, and READ, J., was absent during the argument.

THE PRINCIPAL CASE IS CITED in *Western Pa. R. R. Co. v. Johnson*, 59 Pa. St. 294, to the point that the interest of a railroad company in land taken for railroad purposes is merely an easement of passage or right of way over the land, and use of it for repairing and construction works necessary to the conduct of the road. In *Youngman v. Elmira & W. R. Co.*, 65 Id. 286, it is cited to the point that a railroad, with its appurtenances necessary to the exercise of its franchise, cannot be levied on and sold under a judgment against the corporation.

LLOYD v. FARRELL.

[48 PENNSYLVANIA STATE, 73.]

PURCHASER OF FREE-SIMPLE IS ONLY ENTITLED TO COVENANT AGAINST ACTS OF GRANTOR and his heirs, that is, a covenant of special warranty.

PAROL EVIDENCE TENDING TO PROVE UNDERTAKING BY VENDEE TO TAKE LAND AT HIS OWN RISK should not be submitted to the jury in an action on a bond for the purchase-money, the title having proved defective, where the agreement for the purchase expressly negatived such an undertaking, and the deed subsequently taken contained all the covenant that the purchaser of a perfect title could claim.

WHERE VENDOR AGREES TO CONVEY LAND IN FREE-SIMPLE CLEAR OF ALL ENCUMBRANCES, parol evidence that at the time of the execution of the

agreement it was understood that the vendee should, at his own risk, take whatever title the vendor had, is inadmissible to contradict the written instrument, and incompetent to destroy its covenants. And even if such evidence were admissible to reform the written agreement, it could have no bearing upon the deed of the land subsequently executed.

VENDOR HAVING KNOWLEDGE OF DEFECT IN HIS TITLE CANNOT BIND HIS VENDEE, ignorant of the facts, by an agreement to assume all the risk of the title; the concealment of the facts in such a case is a constructive fraud.

DEFECT IN TITLE OF GRANTOR OF LAND HOLDING PERFECT LEGAL TITLE, subject, however, to a trust as to two undivided third parts thereof to other persons, is not covered by the statutory covenant contained in the words "grant, bargain, and sell" of a deed, or by the express covenant of special warranty therein.

ERROR to the common pleas of Blair County. This was a proceeding in the court below, under which a judgment for two thousand dollars, which had been entered on a warrant of attorney against Gilbert L. Lloyd, at the suit of Thomas Farrell, was opened and the defendant let into a defense. The other facts are stated in the opinion.

Samuel S. Blair, for the plaintiff in error.

Hall and Neff, and John Scott, for the defendant in error.

By Court, **STRONG, J.** That the title to the land, for the purchase-money of which the bond was given, has failed to the extent of two third parts thereof, is beyond controversy. The evidence given at the trial in the court below shows it, and the court so instructed the jury. The plaintiff therefore was not entitled to recover, unless the defendant had agreed to take the risk of a defective title upon himself. If he did, then what he bargained for was not a good title, but such a title as Thomas Farrell gave him, and there has been no failure of consideration.

It was upon this question that the case turned in the court below, and the errors assigned relate mainly to the instruction given to the jury respecting it. The land had belonged to Peter Collins and James Ross. On the 7th of October, 1841, they sold it by articles of agreement to Barnabas Farrell, the father of the plaintiff, for the sum of \$375, of which he paid \$160, the first installment, in full, and eight dollars on account of the second installment. Shortly afterwards he died, leaving three children, of whom the plaintiff, Thomas Farrell, was one. After his death his son Thomas paid the remainder of the purchase-money, and took a deed to himself from Collins and Ross, giving to them a bond conditioned upon his procure-

ment of a release to them by his two sisters. He afterwards purchased a tax title under a sale made in 1846. Having thus a perfect legal title, subject, however, to a trust as to two undivided third parts for his sisters, in May, 1854, he entered into an article of agreement, by which he covenanted to "well and sufficiently grant, convey, and assure unto Gilbert Lloyd (the defendant), his heirs and assigns, in fee-simple, clear of all encumbrances, all the tract of land, in consideration of which the vendee covenanted to pay the sum of six thousand dollars, in installments, as follows: One thousand dollars on the 1st of July, 1854, two thousand dollars on the first day of July, 1855, two thousand dollars on the first day of July, 1856, and one thousand dollars on the first day of July, 1857, the payments to be secured by bond and mortgage. On the first day of July, 1854, in pursuance of this article, Thomas Farrell conveyed the land to the defendant, in fee-simple, describing it as the same as that which had belonged to Peter Collins and James Ross, and which they had conveyed as above described. The deed contained only a covenant of special warranty against the grantor, his heirs and assigns, in addition to the covenant implied in the words "grant, bargain, and sell." On the day of the date of the deed, Lloyd gave his bonds for the unpaid purchase-money, of which that now in litigation is one.

There is nothing either in the agreement or in the deed to show that the purchaser undertook any risk of title, or that he bargained for anything less than a perfect title. The contrary is expressly declared in the article of agreement, and such is the legal effect of the deed. Nor is it pretended that he had any knowledge of defect of title in Thomas Farrell, his grantor. He was not informed of the trust in favor of the grantor's sisters, nor of anything that should have put him upon inquiry. He did not take a deed for the right, title, and interest of his grantor, but a deed for the land itself, with all the covenants to which he was entitled as a purchaser of a perfect title. It is true, the deed contains no covenant of general warranty against the world, but the purchaser of a perfect right is not entitled to anything more than a covenant against the acts of the grantor and his heirs,—that is, a covenant of special warranty: *Withers v. Baird*, 7 Watts, 229 [32 Am. Dec. 754]; *Espy v. Anderson*, 14 Pa. St. 312; *Cadwalader v. Tryon*, 37 Id. 322.

To show, however, that his conveyance was of no more than his own right, and that the defendant bought at his own risk,

the plaintiff called a witness who testified that he was present at the signing of the agreement and at the delivery of the deed; that it was the understanding that Mr. Lloyd was to take whatever title Farrell had at his own risk; that he did not undertake to give the language of the parties; that the conversation was just before the signing of the article; that there was nothing said about the rights or claims of the other heirs, not a word about two thirds of the land belonging to Farrell's two sisters; that the parties came into his office only to sign the agreement; that he did not undertake to give Mr. Lloyd's words, or what Mr. Farrell said, and that the way he had stated it before was, that Lloyd was to take just such title as Farrell had, without guaranty of any kind. The witness said nothing of what took place when the deed was delivered, or after the article of agreement was made. This testimony the court submitted to the jury in connection with the agreement, and the fact that the deed was afterwards taken with only a special warranty as evidence from which they might find whether Lloyd had agreed to take the land at his own risk, and thereby precluded himself from setting up a defect of title as a defense to the plaintiff's claim on the bonds given some months afterwards for the purchase-money. The agreement expressly negatived such an assumption, and the fact that the deed contained no more than a covenant of special warranty was no evidence of it; for, as has been shown, such a covenant is all that the purchaser of a perfect title can claim. This fact should not, therefore, have been presented to the jury as tending to prove an undertaking by the grantee to run the hazard of the title. Nothing then remains but the testimony of the one witness, and this the court was requested to withdraw from the jury as contradictory to the written agreement, and insufficient in itself. We think the request should have been granted. At best, the testimony was indefinite. We are not even informed whose understanding it was of which the witness spoke. Was it his own or that of the parties? Was it the witness's construction of the written agreement, or of the conversation of Farrell and Lloyd? If, as is probable, the witness referred to the understanding of the parties, how did he gather it,—from their negotiation or their written contract? And so far as the testimony had any significance, it was in direct contradiction of the written covenant given by Farrell and exacted by Lloyd, with no evidence or even allegation of mistake or fraud. Had there been nothing

more than the article of agreement between the parties, such parol evidence would have been incompetent to destroy its covenants.

Still more apparent it is that the case should not thus have been submitted to the jury, when it is considered that the real consideration of the defendant's bond was not the agreement, but the deed given in July afterwards. That, standing by itself, purports to assume a title. It is a grant of the land, not of an uncertain right in the land; and there is nothing to show that the grantor did not intend what he expressed by his deed. Even if the written agreement could be reformed and made to express its exact opposite by parol evidence of what the parties said before its execution, such evidence can have no bearing upon the deed. We hold, therefore, that the court erred in submitting, without legal evidence, to the jury the question whether Lloyd took the title to the land at his own risk.

The charge of the learned president of the common pleas was not quite accurate in another particular. He was requested to instruct the jury that the act of Thomas Farrell, in taking the title in his own name from Collins and Ross, and selling to the defendant without disclosing the state of the title, was proof of fraud. The instruction asked for was refused, though the court did say, after the refusal, that the misrepresentation or concealment of a material fact would be fraudulent, and would relieve a party from an agreement to run the risk of the title. The inevitable effect of such instruction upon the minds of the jury must have been to create the impression that, though concealment of a material fact would have been fraudulent, yet concealing the fact that Farrell's two sisters had an equitable title to two thirds of the land sold was not material. This is doubtless not what the court meant, but it is what the jury probably understood. The court intended to say that if Farrell thought he had a good title, good faith did not require him to state to his vendee facts connected with it which he deemed of no importance. But Farrell knew that the land had been purchased by his father from Collins and Ross, and that much of the purchase-money had been paid by him. When he took the title, he agreed to procure releases of the rights of his sisters. That they had rights, he must be presumed to have known. That, with such knowledge concealed in his own bosom, he could have bound his ignorant vendee by an agreement to assume

all the risk of a title would be grossly inequitable. It is idle to say that any court of equity would enforce such a contract. Even in cases of attempted rescission of contracts, it is not indispensable to the interference of such a court that a case of actual fraudulent intention should be made out. Constructive fraud is sufficient: 2 Story's Eq. Jur., sec. 694 et seq. And in this state a contract of sale is not so completely executed as to be beyond the reach of a chancellor until the purchase-money has been actually paid.

There is nothing else in this record that requires particular notice. We do not perceive that the testimony of James Cooper in relation to the profits of the land had any legitimate bearing on the case, and we concur in opinion with the court below that the defect in the plaintiff's title, such as it was, was not covered by the statutory covenant contained in the words "grant, bargain, and sell" of the deed, or by the express covenant of special warranty.

The judgment is reversed, and a *venire de novo* awarded.

WORDS "GRANT, BARGAIN, AND SELL" IN DEED, EFFECT OF: See *Winston v. Vaughan*, 76 Am. Dec. 418, note 421, where other cases are collected; *King v. Gilson*, 83 Id. 269, note 274; *Dickson v. Desires's Adm'r*, 66 Id. 661, note 670.

VENDEE'S RIGHT TO RELIEF ON GROUND OF DEFECT OF TITLE: See *Brown v. Manning*, 74 Am. Dec. 736, note 739. Unless it plainly appears that the purchaser has agreed to take the risk of the title, he may defend in an action for the purchase-money by showing that the title was defective, whether there was a covenant of general warranty, or of right to convey, or of quiet enjoyment by the vendor, or not: *Cross v. Noble*, 67 Pa. St. 78, citing the principal case.

PAROL EVIDENCE CANNOT BE RECEIVED TO SHOW THAT GRANTOR DID NOT WARRANT against a particular encumbrance, where the conveyance covenants against all encumbrances: See *Estabrook v. Smith*, 66 Am. Dec. 445, note 449; *Grice v. Scarborough*, 42 Id. 391, note 395. Parol evidence is, as a general rule, inadmissible to contradict or vary the terms of a written instrument: *Martin v. Berens*, 67 Pa. St. 463, citing the principal case.

THIS CASE CAME BEFORE COURT AGAIN, and is reported as *Farrell v. Lloyd*, 69 Pa. St. 247, where the court say: "We are also of the opinion that the evidence of William M. Lloyd upon this trial, in regard to the agreement by Gilbert L. Lloyd, on his purchase from Thomas Farrell, to take all the risk of the title, was materially different from what it was on the former trial."

HIESTER v. GREEN.

[48 PENNSYLVANIA STATE, 96.]

EQUITABLE LIEN FOR PURCHASE-MONEY OF LAND IS NOT CREATED BY MERE RECITAL on the face of the deed that the purchase-money remains unpaid and is to be paid annually. And where no intention to charge the purchase-money as a lien on the land is expressed in the deed, the law will not imply such an intention, and no lien is created as against a purchaser thereof at sheriff's sale as the property of the grantee.

AMICABLE action in debt between Cynthia E. Green and Isaac E. Hiester. Evan Green, the husband of said Cynthia E. Green, devised to her a house and lot during her widowhood or life, with remainder to their son Amos S. Green. Mrs. Green subsequently, for and in consideration of the payment to her yearly and every year during the continuance of her widowhood, of the sum of one hundred dollars, released to her son, Amos S. Green, all the right, title, and interest to which she was entitled under the will of her late husband. Amos S. Green afterwards mortgaged the house and lot to Isaac E. Hiester. Hiester afterwards obtained judgment on said mortgage, and issued a *levari facias*, on which the sheriff sold the house and lot, as the property of said Amos S. Green, to said Hiester, and executed and delivered to him a deed for the same. If, upon these facts, the court was of opinion that Mrs. Green was entitled to the one hundred dollars per annum mentioned in the release, then judgment was to be entered in her favor, otherwise for the defendant. The court below rendered judgment in favor of the plaintiff for two hundred dollars, for the two yearly payments then due.

Isaac E. Hiester, the plaintiff in error, *pro se*.

H. M. North, for the defendant in error.

By Court, WOODWARD, C. J. *Neas's Appeal*, 31 Pa. St. 293, ruled this cause in the court below, and we are asked to reverse the judgment, on the ground that the decree in that case was contrary to the settled law of Pennsylvania, a demand which ought to have been supported by a better exhibition of authorities than the paper-books contain.

Though I dissented from the ruling in *Neas's Appeal*, *supra*, I would cheerfully have dismissed my doubts and followed it on the present occasion had my brethren been agreed in recognizing it as law; but as they stand equally divided on the question, I am unwilling to give the casting vote without first re-examining the subject in the light of the authorities.

A distinction might be taken between *Neas's Appeal, supra*, and this case, for all that was alleged there was, that a lien existed for the unpaid purchase-money, which, being divested by the sheriff's sale, was entitled to be paid out of the proceeds, whilst here the allegation is, that the lien survived the sheriff's sale, and ran with the land. The question here is, not as it was there, one of distribution, but as expressed in the case stated, it is "whether the plaintiff is entitled to recover from the purchaser at the sheriff's sale one hundred dollars per annum, the consideration mentioned in the release."

Had Mrs. Green come in upon the proceeds of the sale, she would have likened her case to *Neas's Appeal, supra*; but attempting to support her lien against the purchaser notwithstanding the sheriff's sale, a reversal of the judgment she obtained would not necessarily trench upon the ruling in that case.

Not to insist, however, upon this distinction, I prefer to discuss the main question common to both cases, to wit, whether purchase-money reserved in a deed, but not expressly charged upon the land conveyed, is a lien upon that land.

If it be a lien, it is so by virtue of no principle of the common law, and by no statutory provision, and must therefore be classed as an equitable lien, which arises only when the legal title has been conveyed.

The doctrine of equitable liens, though long prevalent in English and some American courts of chancery, was never intended to be admitted into Pennsylvania jurisprudence. If favored by what fell from this court in *Stouffer v. Coleman*, 1 Yeates, 393, and *Irvine v. Campbell*, 6 Binn. 118, it was expressly and very forcibly repudiated in *Kauffelt v. Bower*, 7 Serg. & R. 64 [10 Am. Dec. 428]. That was the case of an executed conveyance by a vendor, half the purchase-money received, and bonds taken for the other half, but no judgments entered on the bonds. Under judgments subsequently obtained against the vendee the land was sold at sheriff's sale, and the vendor claimed the unpaid balance of his purchase-money out of the proceeds of the sale. The masterly opinion of Judge Gibson showed that the doctrine of equitable liens had grown up in England since the foundation of the colonies, and therefore that our ancestors did not bring it with them; that it was opposed to the policy of our legislation; that it was not recognized in the practice of our courts; and that it accorded with neither the professional nor the popular under-

standing. "The implication," he added, "that there is an intention to reserve a lien for the purchase-money in all cases where the parties do not by express acts evince a contrary intention is, in almost every case, inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purports to be a conveyance of everything that can pass. The construction, therefore, which, independently of fraud or mistake, reserves an interest against the express language of the parties, is unnatural and unjust."

In *Semple v. Burd*, 7 Serg. & R. 286, the same views were repeated against a vendor who held an unrecorded mortgage; and in *Megargel v. Saul*, 3 Whart. 20, the court expressed a very confident trust that it was "unalterably established in *Kauffelt v. Bower*, 7 Serg. & R. 64 [10 Am. Dec. 428], that there can be no lien in any case where the vendor has conveyed the legal title."

But in these cases there was nothing on the face of the deed to show that any portion of the purchase-money remained unpaid. The formal acknowledgment of its receipt would imply a fully executed contract on the part of the vendee, and delivery of the deed imported full execution on the part of the vendor. Between parties whose writings wore such a face, there was no ground for implying unexecuted covenants or liens to secure performance of them. But in *Bear v. Whisler*, 7 Watts, 144, we have a conveyance of the legal title, subject, nevertheless, to the conditions and obligations contained in a certain article of agreement between the parties, bearing date the 13th of March last." The agreement here referred to bound the vendee to pay six several bonds of eighty dollars each, and to support the vendor and wife for life. The point ruled was, that the deed was a conveyance on condition, which any party in interest might enforce by ejectment. And this was really all that the case decided; but Judge Rogers took occasion to allude to the doctrine of equitable liens, and approved of the ruling in *Kauffelt v. Bower*, 7 Serg. & R. 64 [10 Am. Dec. 428], but intimated that parties may create such a lien by clear and express words, so as to be binding between themselves and privies.

The next year the case of *Stewartson v. Watts*, 8 Watts, 392, came up. Here was an express charge of the purchase-money upon the land, which was also secured by a mortgage, and a sheriff's sale on judgment junior to the mortgage. The sale

occurred before the act of the 6th of April, 1830, and the court held the lien, whether created by the words of the deed or the mortgage, to be divested by that sale. Judge Rogers vindicated, with great force of argument, the policy that judicial sales should pass property clear of all liens; but he said the court had yielded to certain exceptions, which may be reduced to three: 1. Where liens are created by last wills and testaments as permanent provisions for wives and children; 2. Where from the nature of the encumbrance it will not readily admit of valuation; and 3. Where it is plain from the agreement of the parties that the encumbrance was intended to run with the land. Under one or the other of these heads it was manifestly intended that every lien should fall which was to be saved by judicial decision from the ordinary effects of sheriffs' sales. Mortgages and certain other liens were saved by statutes. In the cases of *Episcopal Academy v. Frieze*, 2 Watts, 16, and *Barnitz v. Smith*, 1 Watts & S. 145, we have instances of liens created by the agreement of parties, and divested by sheriffs' sales on subsequent liens, so that we are not to forget that something more than the creation of a lien by agreement is necessary to make it survive a sheriff's sale; it must be expressly charged upon the land as an encumbrance manifestly intended to run with it. *Bury v. Sieber*, 5 Pa. St. 432, was ruled on the doctrine of *McCall v. Leno*, 9 Serg. & R. 310, which was the case of tacking one security to another, whereby a subsequent encumbrance was saved by relation to a prior one,—quite a different subject from that we are upon. *Dewalt's Appeal*, 20 Pa. St. 236, and *Hart v. Homiller*, 20 Id. 248, were instances of liens not divested by sheriffs' sales, and which admit of classification under the heads above stated.

The sum of the authorities is, that though equitable liens are not favored by our law, yet parties may by clear and express words in deeds of conveyance create liens upon land, either for purchase-money or for performance of collateral conditions which will be binding between themselves and their privies, and such liens will be divested by subsequent sheriffs' sales, unless they are in the nature of testamentary provisions for wives and children, or are not capable of valuation, or are expressly created to run with the land. Now, in view of this state of the law, our immediate question is, whether reciting on the face of the title that the purchase-money remains unpaid, and is to be paid annually, creates such a lien. In

Neas's Appeal, 31 Pa. St. 293, an intention to create a lien was inferred from the fact that the purchase-money stood in the title. But according to all the antecedent cases, express words were necessary to establish the lien. It never before was treated as a subject for legal implication, and it is manifestly a hazardous inference to make; for the pecuniary consideration, essential to all bargains and sales, is generally mentioned on the face of the deed, and if it be said to be unpaid, it is notice of that fact to a subsequent purchaser, but it is no notice to him of a lien. He may reasonably infer that the vendor trusted the personal credit of his vendee for the purchase-money, or took bonds and mortgages or other security, or at the least, that no lien was intended to be created by the deed because none was expressed. These inferences would seem quite as reasonable as that the parties meant what they did not express,—a lien for the unpaid money. When the ill consequences of constructive liens are considered, and it is observed how the legislature and the courts have labored to furnish record notice of liens, it is going very far to say that parties may, even by their express agreement, create a valid lien, but much too far to imply it from mere notice of non-payment of purchase-money, and very much too far to imply a lien, from that single fact, of such tenaciousness that a sheriff's sale will not divest it. Yet all this must be implied to support the lien claimed in this case. If notice of unpaid purchase-money be sufficient to create a lien, *Kauffelt v. Bower*, 7 Serg. & R. 64 [10 Am. Dec. 428], ought to have been differently ruled, for the purchaser there had such notice, but the court refused, for the most solid reasons, to imply a lien.

Mrs. Green's deed was a release of all her estate, right, title, and interest in the premises conveyed, and though the consideration is expressed upon the face of the deed as an annuity of one hundred dollars, there is not a word to import an intention to charge it as a lien on the land. The policy of the law forbids us to surmise or imagine such an intention. But even if we should guess that she meant to reserve a lien, it would not avail her as against the sheriff's sale, unless we held it equivalent to a first mortgage, which would be carrying judicial implications further than *Neas's Appeal*, *supra*, or any other case, and beyond the bounds of prudence and reason.

Now, to wit, October 19, 1864, after argument of this case, and full consideration, the judgment of the court of common

pleas of Lancaster County is reversed and set aside, and judgment is here entered for the defendant.

THOMPSON, J., dissented.

VENDOR'S LIEN, AND WHOM IT AFFECTS: See *Lincoln v. Parcell*, 73 Am. Dec. 196, note 203; *Manly v. Slason*, 52 Id. 60, note 66, where other cases are collected. In Pennsylvania, the recital in a deed that the purchase-money is unpaid, and that it is to be paid annually, creates no lien on the property conveyed: *Borts v. Borts*, 48 Pa. St. 386; S. C., *post*, p. 603, citing the principal case. But where the lien is expressly charged it must be supported: *Heist v. Baker*, 49 Id. 14; *Helfrich v. Weaver*, 61 Id. 390, both citing the principal case. Equitable liens must arise from the express charge of the parties, and not from implication: *Strauss's Appeal*, 49 Id. 357; *Shirley v. Shirley*, 59 Id. 273; *Estate of Lyle*, 11 Phila. 67, all citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED IN *Wertz's Appeal*, 65 Pa. St. 307, to the point that a judicial sale will not discharge an encumbrance when the charge stands in the title, and can be discharged only by the court undertaking to administer the fund by investing it in order to fulfill the purpose of it; and in *Bryan's Appeal*, 101 Id. 392, to the point that a judicial sale will discharge a charge upon real estate where the charge is in the nature of a fixed lien.

WILSON v. COCHRAN.

[48 PENNSYLVANIA STATE, 107.]

VENDER OF LAND WHO PURCHASES WITH KNOWLEDGE OF EXISTING RIGHT OF WAY over it is bound to perform his engagement to pay the purchase-money, when the state of facts continues to be the same as it was at the date of the purchase.

PAROL EVIDENCE EXPLAINING SUBJECT-MATTER OF CONVEYANCE, its condition and peculiarities, does not contradict the deed.

DEBT on bonds for purchase-money. The opinion states the case.

Hamilton and Acheson, for the plaintiff in error.

White and Slagle, for the defendant in error.

By Court, WOODWARD, C. J. Cochran conveyed land to Wilson by a deed which contained a covenant of general warranty, and then brought this suit for part of the purchase-money. Wilson put in an affidavit of defense, alleging a paramount title in one Shultz to a right of way, or private road across the land, — that he purchased without knowledge of the easement, — and that he had been virtually evicted from part of his premises by reason of the use of the right of way.

Upon these allegations we ruled, when the case was here two years ago, that Wilson must be admitted to make his defense,

and if he proved the grounds alleged, that he would be entitled to defalk his damages against the balance of purchase-money.

But upon the trial, instead of the affidavit of defense being sustained, it was fully proved, and the jury found that Wilson purchased with knowledge of Shultz's road, and actually walked it in company with Cochran pending the treaty of purchase.

The case as now presented, therefore, is that of a purchaser with a covenant of general warranty attempting to detain purchase-money on account of a known encumbrance or defect. We were of opinion when the case was here before, and we still are, that the covenant of general warranty would embrace such a defect, though it be in the nature of an incorporeal hereditament, but manifestly no action could be maintained on such a covenant, and therefore purchase-money cannot be detained by virtue of it until after eviction, and the evidence here failed to prove eviction. Indeed, there could be no eviction of that which was never purchased or possessed, and therefore, whilst a right of way successfully asserted against a vendee might be a breach of a covenant of general warranty, if the purchaser had bought without notice of it, yet the law is that he shall perform his engagements wherever his knowledge and the state of facts continue to be the same they were at the date of the purchase. In *Hart v. Porter*, 5 Serg. & R. 204, it was said that the intent that the purchaser was to run the risk of the title might be fairly inferred when he knew of the defect at the time of the purchase, and made no provision against it. To the same effect was the observation made in *Furhman v. Loudon*, 13 Serg. & R. 386 [15 Am. Dec. 608], and repeated in *Lighty v. Shorb*, 3 Penr. & W. 452 [24 Am. Dec. 334], that when the purchaser is aware of a flaw, and provides not against it, he takes the risk of it upon himself. See also *Murphy v. Richardson*, 28 Pa. St. 293, and *Bradford v. Potts*, 9 Id. 37. This last case, *Bradford v. Potts*, was like the present, a purchase with covenant of general warranty, but with actual knowledge of the defect, and the purchaser was remitted to his action on the covenant after he should suffer eviction, and was not permitted to withhold purchase-money. So in *Juvenal v. Jackson*, 14 Pa. St. 519, it was said that a vendee who takes covenant against a known defect shall not detain the purchase-money as a further security against it, for the reason that the covenant would be nugatory if he did.

Where the covenant is actually broken at the time suit is brought for purchase-money, the purchaser, to prevent circuity of action, will be permitted to detain purchase-money to the extent to which he might recover damages upon the covenant. Some covenants are broken as soon as made, but a covenant of general warranty is only broken by eviction,—and without evidence of eviction this purchaser has no ground to stand on. Eviction means a loss of something purchased; but if Wilson bought with Shultz's road open before his eyes, and the necessary inference is that he intended to buy subject to the easement, the mere enjoyment of the road by Shultz is not and cannot be eviction of Wilson. He has got all he bargained for with Cochran, and therefore he should pay as he agreed. Until he is interrupted in something conveyed to him by Cochran (and he knew Cochran could not convey Shultz's road), he has no remedy on the covenant he took for his protection, and therefore no right to detain purchase-money. As the case is now presented, the legal presumption is, that he compensated himself for the easement by a diminished price agreed to be paid for the land, and he must not compensate himself twice.

But it has been suggested that this mode of ruling the case is virtually impairing a written covenant by parol evidence. Not at all. The subject-matter of the conveyance, its condition and peculiarities, may be explained by parol without any contradiction of a deed. Do we contradict the conveyance of a tract of land when we permit it to be proved by parol that it is covered with timber, or is an improved farm, or contains a water-power, or has a private road upon it? If a vendee means to exclude proof upon such subjects, he should take a more special covenant than a general warranty of title. But had he taken, in this instance, a covenant against private ways, it is he who would want the parol evidence to establish the breach. Indeed, it is he who opens the door for parol evidence under the general covenant, for he proves the Shultz road by parol, and the plaintiff only proves that the defendant bought subject to the road. We see no impeachment or contradiction of the conveyance by such evidence.

The several points made by the defendant seem to have been well answered, and the judgment is affirmed.

RIGHT OF WAY OVER LANDS, HOW ACQUIRED: See *Pierce v. Cloud*, 82 Am. Dec. 496, note 498, where other cases are collected.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN BUT NOT TO VARY WRITING: See *Cooper v. Berry*, 68 Am. Dec. 468, note 480; it is admissible to identify the person or thing mentioned in the contract: *Henderson v. Hackney*, 68 Id. 529, note 534; *Summerlin v. Hesterly*, 65 Id. 639, note 641; evidence of surrounding circumstances is also admissible: *French v. Hayes*, 80 Id. 127, note 130.

THE PRINCIPAL CASE IS CITED TO THESE POINTS IN THE FOLLOWING CASES: A covenant of general warranty is broken by the owner of a private way who throws down the fences to enable him to exercise his right of passage on the land: *Philadelphia, W., & B. R. R. Co. v. Williams*, 54 Pa. St. 109; to maintain an action upon a covenant of general warranty there must have been a change of possession: *Knepper v. Kurtz*, 58 Id. 484. If there be a public road or highway open or in use upon land, the purchaser must be taken to have seen it, and to have fixed in his own mind the price that he was willing to give for the land, with reference to the road: *Memmert v. McKeen*, 112 Id. 321.

PHILLIPS v. PHILLIPS.

[43 PENNSYLVANIA STATE, 178.]

SERVITUDES ADOPTED BY OWNER OF LAND, which are of a permanent nature, notorious or plainly visible, and from the character of which it may be presumed that he intended their preservation as evidently necessary to the convenient enjoyment of the property to which they belong, become, when the lands are divided and pass into other hands, permanent appurtenances thereto, and neither the owner of the dominant or of the servient portion of the land has any right to interfere with their proper use and enjoyment.

ACTION on the case for obstructing an alleged right of way. The agreement referred to in the opinion between the grandfather of the plaintiffs and Larimer provided that the widow and heirs of Thomas Phillips might continue to occupy and reside upon the forty acres occupied by said Thomas Phillips at the time of his death during the natural life of said David Phillips, they or said Larimer for them paying ten dollars a year rent therefor; "and at the death of said David Phillips, they, the said heirs of the said Thomas Phillips, shall hold and possess the said tract of land to them and their heirs and assigns in fee-simple." The evidence of the witness referred to in the opinion was that Hiram McCabe, one of the defendants, had told him that David Phillips told McCabe that he had granted this right of way to Thomas Phillips and his family. The other facts are sufficiently stated in the opinion.

B. F. Lucas, for the plaintiffs in error.

R. and S. Woods, for the defendants in error.

By Court, THOMPSON, J. The difficulty in the mind of the counsel for the plaintiff in error in this case seems to be his inability to discover a principle upon which the alleged right of way involved may exist, and in truth this is the real difficulty of the case. Can it be resolved?

The grandfather of the plaintiffs, David Phillips, was in his lifetime the owner of 153 acres and 20 perches of land in one body. Many years before his death he divided it into four portions by surveys on the ground, and to each of his sons, viz., Thomas, Nelson, and Evan, he gave the possession of one of these purports, and retained one, on which was the homestead, for his own residence and occupancy. Thomas, whose children are the plaintiffs, had been in possession of his portion, as proved by many witnesses, between twenty and twenty-five years before his death. His father undoubtedly designed it for him, as did he the portions in the occupancy of his brothers; for by a will dated in 1853, and proved in 1856, he devised the same to him in fee as he did the other portions to his brothers.

It is not clear when the way in question was laid out or by whom; but it seems to have been always used by Thomas, as the most, if not the only, convenient road to church, to mill, to the coal-bank, and to the neighboring village. After leaving the boundary of Thomas's forty acres, it passes some twenty rods through the division or portion of the land remaining in the possession and occupancy of his father. It lay near his house, and was used by him, as he might desire, either for hauling fuel or going to his son's residence. The whole land was his during all the time of the user; and the user was by his assent and knowledge, as the jury have found. The proposition is undoubtedly true, that if the road was not actually laid out on the ground by David, the father of Thomas, he had full knowledge of its location, and used it, and consented to its use by his son, his tenant, for many years. It was a continuous and notorious way all the time, at the date of his will and at the day of his death, never altered, changed, or objected to in any way by him. Nay, more: the testimony is that it was fenced out into a lane for most if not all the time on the land retained by him, which we must presume was, if not done by himself, done by his authority, and was most pregnant evidence of his assent to its location and use. We cannot but regard those undisputed facts, if failing to establish a precedent authority or command

to lay out the road as equivalent to it, in clearly showing a subsequent assent to the servieney imposed on the portion occupied by him. The facts can be regarded in no other light. The road, therefore, was his road for the convenience of his own property, the same in effect as if laid out by himself.

It is quite true, as contended for by the learned counsel of the plaintiff in error, that the user by Thomas of the way, even if equal in time to the period within which a grant of the right of way may be presumed, in case of an independent owner and adverse occupancy, establishes no right upon that principle under the circumstances here. A tenant cannot acquire any kind of easement by prescription as against his landlord. As such a right rests upon the presumption of a grant, it would lead to the absurdity of presuming a grant of a man to himself; for the tenant's possession is his possession, and whatever is lawfully done on the premises is presumed to be done with the sanction of the landlord.

But there is a principle discussed in *Kieffer v. Imhoff*, 23 Pa. St. 438, in a learned opinion by Lewis, C. J., which I think justifies the charge of the learned judge in this case, although not referred to by him nor the counsel on argument. In that case the easement was an alley, and both the dominant and servient properties fell into one ownership; the consequence of which, according to the common law, would be an extinction of the easement in the higher right of property: *Holmes v. Goring*, 2 Bing. 83; S. C., 9 Moore, 166; and *Shury v. Piggot*, 3 Bulst. 340. The alley was kept open after the unity of the title and possession as before; but while the property thus belonged to one owner, it was seized in execution and sold to several purchasers, and the question afterwards arose, whether the easement was extinguished by the unity or remained; and it was held that it did remain, upon the principle of a servitude imposed by the sole owner, and existing at the time of the seizure and sale. "Servitudes," says the opinion, "which are extinguished by unity of title do not in general revive upon severance; but where they are apparent and obviously continuous they do. The disposition made by the owner of both estates is held to be equivalent to a title. *La destination du pere de famille vaut titre*: Civil Code La., art. 808; Code Civile, tit. Servitudes, sec. 288; Gale and Whatley on Easements, 40 (t. p. 82, 83). Although the service which one estate derived from the other was nothing more than destination du pere de famille, or the disposition of the owner, so

long as the heritage belongs to the same person, it becomes a servitude as soon as they pass into the hands of different proprietors: Pardessus *Traite du Serv.*, sec. 288; Gale and Whatley on Easements, 89 (t. p. 82).

This is the rule of the civil law on this subject, which by Chancellor Kent is said to be of "permanent and universal application": 3 Kent's Com. 436; and in the case just cited it is said "these doctrines of the civil law have been fully recognized by the highest authorities in our own jurisprudence"; and Gale and Whatley, 82, says "the English law upon this subject appears to agree" with the civil law also.

It is not to be understood by this doctrine that any temporary convenience adopted by the owner of property is within it. By all the authorities it is confined to cases of servitudes of a permanent nature, notorious or plainly visible, and from the character of which it may be presumed that the owner was desirous of their preservation as servitudes, evidently necessary to the convenient enjoyment of the property to which they belong, and not for the purposes of mere pleasure: Gale and Whatley on Easements, 88.

A way to a church, mill, or market, greatly more convenient than any other, has sometimes been held in England to stand on the footing of a way of necessity. But, not to insist on that principle, the fact exists here that this way is, although not the only one to the mill, the church, and the village, yet for the portion of the estate belonging to the plaintiffs it is the only convenient way to these points. In this, although we do not recognize a way of necessity, we see the reason for the creation of this private way, why it was opened, kept open, and used by the owner and his family until his death, and the same condition of things as regards the surroundings continuing, we may presume that it must have been the intention of the owner that it should remain permanent, inasmuch as he made a final disposition by will of both the dominant and servient portions, without the slightest hint of a wish that their relations to each other should in this particular be changed.

I am aware that the most common cases of servitudes in this country arise out of the passage of the element of water from one portion of property to another by drains, water-pipes, mill-races, and the like. Of the latter kind was *Seibert v. Levar*, 8 Pa. St. 383, and the servitude there, as in most cases, was created simply by the act of the owner in constructing the race. The nature of the servitude, however, ought not to be

held to control the principle, and does not, as the case of *Kieffer v. Imhoff*, 26 Id. 438, sufficiently proves. It may be granted that the continuance of drains, water-pipes, and mill-races may more distinctly indicate their permanent and essential nature than a mere private way; but when the permanency of the way is proved, confessed, or not disputed, this difference vanishes; they stand on the same footing. There are many cases which show this, in addition to *Kieffer v. Imhoff*, *supra*.

In 3 Cruise, 115, there is a case from *Jenkins's Cases* (case 87) which at the same time illustrates, not only the antiquity of this doctrine as adopted in the common-law courts, but also its application to a right of private way, not very dissimilar in circumstances to the one in hand. It is there stated by that learned barrister, "that where, upon a descent to two daughters, land over which there had been a right of way was allotted to one of them, and the land to which the right of way belonged was allotted to the other, it was held that this allotment, without speciality to have the way anciently used, was sufficient to revive it." But I need not follow the investigation further, as the cases already cited show the recognition of the doctrine in this commonwealth, and rule the principle which governs this case.

There was but little conflict or dispute about the main facts of the case. They were all submitted to the jury with the instruction that if they believed them the plaintiff would be entitled to recover. This was in fact an instruction that if the way was laid out, fenced, and used by the plaintiff's intestate, with the knowledge, assent, and acquiescence of his father, for the period testified to, it was to be regarded as a regulation or disposition by him. No other rational view could be taken of it. The road lay over his property, within a few rods of his own door, and he had used it and acquiesced in its use for a quarter of a century. It was a distinct and notorious way, fenced out on the portion occupied by himself as well as on the portion occupied by his son, his tenant, for most of the time. It was constructed on and over his own property, by his own agent, and if we were to assume that he did not actively engage in its construction, his subsequent assent, as already said, was equal to a previous authority. As a permanent disposition, it passed by his will as appurtenant, or perhaps rather as parcel, of the property devised to the plaintiffs, and the defendants had no right to interfere and do what their testator never did,—attempt to close it up.

We need not discuss the question proposed as to which is the better title in the plaintiffs, the articles of agreement between their grandfather and Larimer, or the devise contained in his will. This is out of the case under the views we entertain. But on this point we do not hesitate to say that the devise is the true title. The agreement was to subserve a temporary purpose, which it discloses, and was no revocation of the will.

Nor do we think there was error in admitting the testimony of Boyer, limited in its operation as it was to McCabe alone. It brought home to him at least knowledge that the way he assisted to obstruct was a way granted by the grandfather of the plaintiffs. It could not have been excluded, because it did not directly apply to the other defendants, if it applied to him, and we do not know that they were injured by it.

Judgment affirmed.

CREATION OF EASEMENT ON ONE OF TWO TRACTS BY OWNER OF BOTH: See *Seymour v. Lewis*, 78 Am. Dec. 108, note 120, where this subject is discussed. A permanent road established by an owner over his property, necessary for its convenient use, is not destroyed by his sale or his encumbrance: *Pennsylvania R. R. Co. v. Jones*, 50 Pa. St. 424; *Trust Estate of Fry*, 11 Phila. 306; *Goodall v. Godfrey*, 53 Vt. 225, all citing the principal case. In case of a continuous and apparent easement, the purchaser, whether at private or judicial sale, takes the property subject to the easement: *Overdeer v. Updegraff*, 69 Pa. St. 119, citing the principal case. Every grant of a thing naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for: *Morrison v. King*, 62 Ill. 36, also citing the principal case.

SMITH v. O'CONNOR.

[48 PENNSYLVANIA STATE, 218.]

CHILD OF TENDER YEARS IS HELD ONLY TO EXERCISE OF THAT DEGREE OF CARE and discretion to be ordinarily expected from children of that age; the rule of law as to mutual negligence applicable between adult parties does not apply to the case of such a child.

NEGLIGENCE IS QUESTION FOR JURY EXCLUSIVELY TO DETERMINE.

TRESPASS on the case brought by Ellen O'Connor, a child of about seven or eight years of age, by her next friend, against William Smith, to recover damages for alleged personal injuries sustained by her in consequence of the defendant's driving a horse and wagon against her upon Penn Street, in the city of Pittsburgh. The instruction in reference to damages, referred to in the opinion, was in these words: "You can legitimately

allow only the loss or damage strictly belonging to the child herself. She received some injury and suffered some pain, for which she is to be compensated, if the defendant is liable, but only compensated,—the defendant not punished by exemplary damages. If her injuries were permanent, her compensation would be increased accordingly. They were not permanent, but she was deprived of school for some time." The other facts are sufficiently stated in the opinion.

Marshall and Brown, for the plaintiff in error.

Defendant's counsel presented no printed argument.

By Court, STRONG, J. This was an action of trespass upon the case brought by a girl seven years old, suing by her next friend, to recover from the defendant damages for his having negligently driven a horse and wagon over her while she was crossing one of the streets in the city of Pittsburgh. The question whether the defendant had been guilty of the negligence alleged was fairly submitted to the jury, and in regard to that there is no complaint. The errors assigned here relate principally to the instruction given respecting the effect of negligent conduct by the plaintiff herself; conduct which contributed to the injury she had sustained. Upon this subject, the parties were at variance in the court below, and in reference to it each sought specific instruction to the jury. On the part of the plaintiff, the court was asked to charge "that the rule of law relating to mutual negligence on the part of a plaintiff and defendant, between adults, does not apply to the case of a child seven years of age who is a party," and this proposition the court affirmed. On the other hand, the defendant requested the court to charge, "that if the plaintiff was guilty of any negligence on her part, which contributed to the accident, she could not recover in this action, although the defendant might have been also guilty of negligence or want of due care." To this point the court returned a negative answer, adding, however, the qualification, "unless the degree of negligence was such, on both sides, that the jury could not determine by whose fault the accident happened." Precisely what was meant by this qualification is not very evident, and we need not inquire, for it can have no bearing upon any of the errors assigned. Other similar instructions were given, but the answers to these two points will suffice to show what importance, if any, the jury was permitted to attach to the negligent conduct of the plaintiff, which it was alleged had been a concurrent cause of the

injury she had sustained. A consideration of the conduct of the plaintiff was not withdrawn from the jury, for they were expressly instructed that the child was to be held to the exercise of that degree of care and discretion ordinarily to be expected from children of its age, neither more nor less; but the court refused to instruct them that the same degree of caution is demanded of an infant of tender years, in order to enable her to maintain an action for a personal injury, as is exacted from an adult. Herein, it is alleged, there was error, and the argument of the plaintiff in error has been directed in this court to show that the admitted rule, that when an injury has been the result of mutual and concurring negligence in both parties no action will lie by either, is applicable in its fullest extent to an action in which the plaintiff is an infant seven years old. We are asked to approve and apply the doctrine held by the New York courts, and first enunciated in *Hartfield v. Roper*, 21 Wend. 615 [34 Am. Dec. 273]. There it is ruled that the negligence or imprudence of the parents or guardians in allowing a child of tender age to be exposed to injury in a highway furnishes the same answer to an action by the child as the negligence or other fault of an adult plaintiff would in a similar case. The negligence of the parents or guardians is imputed to the child, and hence, unless the infant plaintiff has exercised that care and prudence which is demanded of an adult, unless equally guiltless of any negligence concurring with a wrongful act of a defendant in causing an injury, no action can be sustained. This is compelling the child to the exercise, not of its own, but of its parents' discretion. It is holding it responsible for the ordinary care of adults. In our opinion, the rule thus broadly stated does not rest upon sound reason. In maintaining it, the New York courts stand supported only by the supreme court of Massachusetts, in the case of *Holly v. Boston Gas Light Co.*, 8 Gray, 123 [69 Am. Dec. 233].

On the other hand, the court of queen's bench, after full consideration, held in *Lynch v. Nurdin*, 1 Q. B. 29, that a defendant was liable to an infant seven years old in an action on the case for an injury resulting from his negligence, though the plaintiff was a trespasser and contributed to the mischief by his own act. The concurring fault of such a plaintiff was not allowed to bar his action, and the rule invoked by the plaintiff in error in this case, and generally enforced against an adult plaintiff, was declared inapplicable to a child of tender age. The English doctrine is maintained by a majority of

the courts in this country. Thus in *Robinson v. Cone*, 22 Vt. 213 [54 Am. Dec. 67], it was adopted in preference to that held in *Hartfield v. Roper*, 21 Wend. 615 [34 Am. Dec. 273]. So it was enforced in *Birge v. Gardiner*, 19 Conn. 507 [50 Am. Dec. 261], and in *Daley v. Norwich R. R. Co.*, 26 Id. 591 [68 Am. Dec. 413]. Our own decisions have been to the same effect: *Rauch v. Lloyd*, 31 Pa. St. 358 [72 Am. Dec. 747]; and *Pennsylvania R. R. Co. v. Kelley*, 31 Id. 372. It is true that *Lynch v. Nurdin*, 1 Q. B. 29, has been doubted in England: *Lygo v. Newbold*, 9 Ex. 302; and there is difficulty in reconciling with it some modern decisions, but it has never been overruled. Moreover, its doctrine is sustained by very considerable reason as well as authority. The reason most frequently given for the rule that concurrent negligence of the plaintiff bars his action is, that were it otherwise he might compel compensation from another for his own wrong. Negligent conduct of an adult, if he be of sound mind, is always a wrong, for it is a failure to discharge duty. To determine whether there has been negligence demands, therefore, the previous inquiry, What was duty? The common sense of mankind exacts more from those who have arrived at years of discretion than it does from a child of tender age. That would be culpable negligence in an adult which neither common sense nor the law pronounces such in a child seven years old, and this because the measure of duty is dependent largely upon the judgment and discretion of the person who is required to perform it. Hence the rule invoked by the plaintiff in error would be extended beyond its reason, if applied to bar an action brought by a child seven years old, on account of conduct which might justly be regarded culpable negligence in a person of ordinary discretion. The child is not culpable for failing to exercise a prudence and care which belong only to persons of riper years, and therefore, when claiming redress for an injury, it cannot be said to be seeking compensation possibly for its own fault. Nor has a wrong-doer defendant in such a case any reason to complain that an injured child is not held responsible for its want of ordinary care. He is called upon to answer for his own misconduct, and no more, alike when the plaintiff is an infant as when the plaintiff is an adult. His guilt is the same in both cases, though the consequences of his fault may be different. It may be his good fortune that in the one case the person injured was also blameworthy, but this cannot detract from the wrong of his own conduct. Undoubtedly the age and

capacity of the person injured may have something to do with the question whether a defendant was guilty of negligence, for every one has a right to act upon the supposition that adult persons will take ordinary care to avoid danger, while such a presumption is unwarranted respecting the conduct of those who have not reached years of ordinary discretion. Hence a higher degree of care and greater precaution are justly demanded to avoid injury to the latter. But when the wrongful conduct of a defendant has been established, it is not unjust to him that he should be required to repair the mischief he has done. Courts may not enforce this in favor of one who was in concurrent fault, but such a one is not an infant seven years old.

We adhere, therefore, to the doctrine advanced in *Lynch v. Nurdin*, 1 Q. B. 29, and heretofore recognized as law in this state in the cases cited, rather than to that adopted by the supreme court of New York. We regard it as founded in better reason and as intrinsically just. We speak now of it only as applicable to an action brought by an infant himself for an injury sustained in his own person in consequence of the negligent conduct of another. Such is the case at present before us. When an action is brought by a father for an injury to his infant son, by which the son's services have been lost, there are perhaps other considerations to be regarded. In such a case it may be that the father should be treated as a concurrent wrong-doer. The evidence may reveal him such. His own fault may have contributed as much to the injury of the child, and consequently to the loss of services due him, as did the fault of the defendant. He owes to the child protection. It is his duty to shield it from danger, and his duty is the greater the more helpless and indiscreet the child is. If by his own carelessness, his neglect of the duty of protection, he contributes to his own loss of the child's services, he may be said to be *in pari delicto* with a negligent defendant. But for the case in hand, it is necessary for us to rule no more than that the plaintiff's want of that care in avoiding the hurt which the law exacts from an adult was not a defense to the action, and that the court below was not in error in their answers to the points proposed.

We pass the answers to the other points submitted without any extended notice. They have been sufficiently vindicated by the observations we have already made. The points presented by the defendant could not have been affirmed for

still another reason. They called upon the court to declare certain conduct of the plaintiff negligent. This was a conclusion the jury alone could draw, even if negligence of the plaintiff was a bar to the action. It was exclusively for them to determine, both what was the standard of duty and whether there had been a failure to perform it.

And finally, there is no sufficient reason for complaining of the instruction given respecting the damages. The loss of the privilege of attending school was, to a child of the plaintiff's age, like the loss of time or the ability to work,—a natural and inevitable consequence of the hurt she received.

Judgment is affirmed.

CHILD OF TENDER YEARS IS NOT REQUIRED TO EXERCISE SAME DEGREE OF CARE that is demanded of an adult: *Rauch v. Lloyd*, 72 Am. Dec. 747, note 757; *East Tenn. & Ga. R. R. Co. v. St. John*, 73 Id. 149, note 153; *Chicago, B., & Q. R. R. Co. v. Dewey*, 79 Id. 374, note 376. The youth of the plaintiff may excuse concurrent negligence, where there is clear negligence on the part of the defendant: *Flower v. Pennsylvania R. R. Co.*, 69 Pa. St. 215, citing the principal case.

PARENT'S NEGLIGENCE, WHETHER IMPUTABLE TO CHILD: See *Holly v. Boston Gas Light Co.*, 69 Am. Dec. 233, note 239; *Daley v. Norwich & W. R. R. Co.*, 68 Id. 413, note 420, where other cases are collected. When an action is brought by a father for an injury to his infant child, the father should be treated as a concurrent wrong-doer, if the evidence reveals him as such: *Glassey v. Hestonville etc. R'y Co.*, 57 Pa. St. 174; *Smith v. Hestonville etc. R'y Co.* 92 Id. 454, both citing the principal case.

WHAT IS REASONABLE OR DUE CARE DEPENDS ON SUBJECT-MATTER to which the care is to be applied, and the attendant circumstances: *Davis v. Winslow*, 81 Am. Dec. 573. That which in one case would be an ordinary and proper use of one's rights may, by a change of circumstances, become negligence and a want of due care: *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 273; *Railroad Co. v. Gladmon*, 15 Wall. 408, both citing the principal case.

ALTHOUGH INFANT OF TENDER YEARS MAY RECOVER AGAINST WRONG-DOER FOR INJURY which was partly caused by his own imprudent act, an adult father cannot: *Bellefontaine & I. R. R. Co. v. Snyder*, 18 Ohio St. 414, citing the principal case.

NEGLECTANCE IS QUESTION OF FACT FOR JURY: *Hill v. Gust*, 55 Ind. 50, citing the principal case.

THE PRINCIPAL CASE IS CITED in *St. Louis etc. R'y Co. v. Valerius*, 58 Ind. 518, to the point that an employee of a railroad can be held to no higher degree of intelligence and capacity than his youth, inexperience, and want of judgment as known to his employer would warrant.

HOUSE v. ADAMS AND COMPANY.

[48 PENNSYLVANIA STATE, 261.]

CESATION OF MAILS AND COMMERCIAL INTERCOURSE BETWEEN PITTSBURGH AND NEW ORLEANS, while blockaded by the authority of the United States during the Rebellion, is a sufficient excuse for the omission to give due and regular notice of the dishonor of a bill of exchange drawn by a mercantile firm in the former city on one in the latter. And a recovery on such bill may be had if such notice was given within a reasonable time after the removal of the impediment.

ASSUMPSIT by John I. and Edward House, doing business as John I. House & Co., against Alexander King and Michael McCullough, doing business as Adams & Co., upon two bills of exchange. The facts are stated in the opinion.

C. Shaler, for the plaintiffs.

Robert Woods and Thomas McConnell, for the defendants.

By Court, **READ, J.** Presentment for acceptance is not necessary in the case of a bill of exchange, payable at a certain period after date, and in Pennsylvania the drawer is not discharged for want of notice of non-acceptance, provided he receives notice of non-payment: *Read v. Adams*, 6 Serg. & R. 356. The question, therefore, in the present case narrows itself down to whether due notice was given of the non-payment of the two bills of exchange which are the subject of this suit.

The first bill was for \$112, and was protested at New Orleans for non-payment, on the 11th of June, 1861. The second bill, for \$351.25, was protested at the same place for non-payment, on the 29th of July, 1861. Notice of non-payment was not received by the holders of these bills at Pittsburgh until the 14th of July, 1862, when the protests and drafts were received by them by mail, and proper notice of their dishonor was given to the indorser and drawers. According to strict commercial law in ordinary cases, this notice came too late, but the state of the country is alleged as an excuse, and it therefore becomes necessary to determine the rule in such cases, and its applicability to the history of the times and the facts disclosed on the trial.

Judge Story, in his commentaries on the law of promissory notes, section 257, has enumerated, among the sufficient excuses for non-presentment and demand at the time and place when and where the promissory note is due and payable, the following: "3. The presence of political circumstances,

amounting to a virtual interruption and obstruction of the ordinary negotiations of trade, called the *vis major*; 4. The breaking out of war between the country of the maker and that of the holder; 5. The occupation of the country where the parties live, or where the note is payable, by a public enemy, which suspends commercial intercourse; 6. Public and positive interdictions and prohibitions of the state, which obstruct or suspend commerce and intercourse." And in section 356 of the same work, the learned commentator enumerates them also as constituting sufficient excuses for the omission of due and regular notice of the dishonor.

Upon this subject there are two leading cases, one in England and one in America. In *Patience v. Townley*, 2 J. P. Smith, 224 (1805), which was an action on a bill of exchange by the holder against one of the antecedent parties, the bill was drawn the 1st of June, 1800, at three months usance on Leghorn, and was due on the 10th of September, 1800, but was not presented either for acceptance or payment until the 31st of October, 1800. The protest stated that it was not paid because not presented in due time. At the trial, before Lord Ellenborough, C. J., this was relied upon as a defense to the action, but the plaintiff proved that from the particular situation of the country, Leghorn being then occupied by the enemy, or in some such critical situation, though the bill was sent out by the plaintiff for the purpose of being presented, it was impossible to present it in due time, and it was presented as early as could be afterwards, and there was a verdict for the plaintiff. This was affirmed by the court of king's bench, on a motion for a new trial by Mr. Erskine on a technical ground, not disputing the ruling at *nisi prius*, where Lord Ellenborough said: "It was left to the jury to say whether, from the situation of the country, it was possible for the plaintiff to present it in due time."

In *Hopkirk v. Page*, 2 Brock. 20, a case growing out of our Revolutionary War, Chief Justice Marshall, page 34, uses this language: "The second bill was drawn on the twenty-sixth day of November, 1775, for £246 3s. 7d., and was protested on the twenty-sixth day of June, 1776. It was drawn after the commencement of hostilities in Virginia, and before it was protested all intercourse between the two countries was interdicted. Under these circumstances notice is not to be expected, and ought not to be required. I at first doubted whether a bill which for a length of time is held under cir-

cumstances which dispense with notice does not lose its commercial character and become an ordinary debt. But on reflection, I am satisfied that this idea cannot be sustained, and that to charge the drawer notice of the dishonor of his bill ought to be given within a reasonable time after the removal of the impediment."

To apply these principles to the present case, it is necessary briefly to refer to the history of the times. On the 20th of December, 1860, South Carolina passed a secession ordinance, which example was followed by Mississippi, Alabama, Florida, Georgia, and on the 26th of January, 1861, by Louisiana, whose state authorities immediately seized the United States branch mint and the custom-house at New Orleans, with the government funds, amounting to more than five hundred thousand dollars, and the United States revenue cutter Robert McClelland was traitorously surrendered by Captain Breshwood to the state of Louisiana. On the 1st of February, Texas seceded, and on the 9th of the same month the rebel congress at Montgomery elected Jefferson Davis president of the Confederate States of America, and on the 11th of March, the constitution of the Confederate States was unanimously adopted. On the 12th of April, Fort Sumter was bombarded, and on the 14th capitulated, and on the 21st of May the rebel congress adjourned to meet at Richmond on the 20th of July, where their meetings have since been held.

On the 19th of April, the President issued his proclamation establishing a blockade of the ports of the seceded states above stated, which, on the 27th of the same month, was extended to the ports of the states of Virginia and North Carolina. On the 3d of May, a proclamation was issued, calling for three years' volunteers, and increasing the regular army and navy, and on the 10th of May, martial law was declared on certain islands on the coast of Florida. On the 26th of August, the President, in pursuance of the act of Congress of the 13th of July, 1861, declared the inhabitants of these states in a state of insurrection against the United States, and that all commercial intercourse between the same and the inhabitants thereof and the citizens of other states and other parts of the United States is unlawful, and will remain unlawful until such insurrection shall cease or have been suppressed. On the 12th of May, 1861, the President, by his proclamation, declared that the blockade of the ports of Beaufort, Port Royal, and New Orleans should so far cease and determine from and after

the first day of June next that commercial intercourse with these ports, except as to persons, things, and information contraband of war, may from that time be carried on subject to the laws of the United States, and to the limitations and in pursuance of the regulations prescribed by the Secretary of the Treasury in his order appended to the proclamation. On the 1st of July, 1862, in pursuance of the second section of an act of Congress of the 7th of June, 1862, the President, by his proclamation, declared that certain states, including Louisiana, were then in insurrection and rebellion, and the civil authority of the United States so obstructed that the provisions of the act of the 5th of August, 1861, could not be peaceably executed; that the taxes upon real estate under the act aforesaid, within said states, with a penalty of fifty per centum of said taxes, should be a lien upon the same till paid.

Flag-officer Farragut, having run past forts Jackson and St. Philip, New Orleans was surrendered on the 28th of April, 1862, and the American flag was hoisted on the custom-house, post-office, mint, and city hall, and the forts were also surrendered that evening. In the report of the Postmaster-General of the 2d of December, 1861 (Message and Documents 1861-62, pt. 3, p. 558), he says: "In consequence of the defection of the insurrectionary states, and the termination of the mail service in those states, on the 31st of May last, under the act of Congress approved February 28, 1861 (with the exception of service in Western Virginia), it becomes necessary to present the transportation statistics in two divisions; these are shown in tables A and B attached to the report." Table B, at page 602, is headed "Table of mail service in the following states [including Louisiana] as it stood on the 31st of May, 1861, discontinued under act of Congress, approved February 28, 1861."

By the evidence it appears that the Farmers' Deposit Banking Company, with whom these drafts were left by the plaintiff for collection about the 1st of May, 1861, returned them, declining to collect them on account of the irregularity of the mails. They were then immediately transmitted by the plaintiffs to Burbridge & Co., their agents at New Orleans.

It also appeared by the evidence of the postmaster at Pittsburgh that all postal service in Louisiana and other named places was suspended on and after the 31st of May, 1861. On the 26th of May, 1862, the first mail went out to New Orleans, carrying ten thousand letters, including the letters

which had accumulated in the dead-letter office. This mail was carried by the steamer Blackstone; since then the regular route to New Orleans has been by New York. This cause was tried on the 9th of December, 1862, and the testimony, of course, is to be taken as delivered at that time.

"The first mail from New Orleans was an enormous one. We received ours from it about the 1st of July, 1862," says the postmaster at Pittsburgh. "There were considerable intervals between the reception of the first mails after resumption."

The omission of due and regular notice of the dishonor of these bills is therefore satisfactorily accounted for by the entire cessation of all mails and commercial intercourse with New Orleans, a blockaded port; and the only question is, whether such notice was given within a reasonable time after the removal of the impediment. It will be recollected that the only communication between Pittsburgh and New Orleans was by sea, through the port of New York, and that the very first mail received was about the 1st of July. Under these circumstances, particularly as connected with the unsettled state of affairs at New Orleans, although in our possession, we cannot say the notice received at Pittsburgh on the 14th of July was not within a reasonable time after the removal of the impediment.

The judgment of the court must therefore be reversed, and judgment entered on the verdict in favor of the plaintiffs.

NOTICE OF DISHONOR OR NON-PAYMENT OF NEGOTIABLE INSTRUMENT, what excuses omission to give: See *Selden v. Washington*, 79 Am. Dec. 659, note 661; *Beale v. Parrish*, 75 Id. 414, note 418.

LAUGHLIN v. LORENZ'S ADMINISTRATOR.

[48 PENNSYLVANIA STATE, 275.]

PERSONAL REPRESENTATIVE OF DECEASED PARTNER MAY CARRY ON BUSINESS for and bind his estate where the articles of copartnership contained a covenant to that effect. A covenant for the continuation of a partnership for a reasonable period after the death of one of the partners is binding on his estate, if assented to and carried out by his personal representatives.

WHERE ON DEATH OF PARTNER BUSINESS OF FIRM IS CLOSED BY CREATION OF NEW FIRM, composed of the surviving partner and the representatives of the deceased partner, the creditors of the new firm become clothed with those equities of that firm against the estate of the decedent, which arose out of the payment by the new firm of the debts of the old firm.

BILL in equity filed by James Laughlin, trustee of the Pittsburgh Trust Company, against the administrators of F. Lorenz, deceased, Mary H. Stewart and William Thompson, administrators of Thomas H. Stewart, deceased, and James J. Gray and Charles H. Lorenz. The bill charged a partnership, commencing November 29, 1853, between F. Lorenz and T. H. Stewart, for the manufacture of iron and nails, which was not to be dissolved by the death of either one of the partners, but to continue to the 1st of August following, as stated in the opinion; that F. Lorenz died in October, 1854, and the business was continued by Stewart until August 1, 1855, and that he and Gray and Charles H. Lorenz entered into a partnership in the same business, at the same place, and under the same firm name; that, at the request of the administrators, the new firm settled up the business of the old firm, and in doing so became a creditor of it to the amount of about forty-eight thousand dollars; that on the 31st of December, 1857, the new firm assigned this debt to the plaintiff as collateral security for a larger debt due by it to the trust company; and that Thomas H. Stewart died insolvent. The bill prayed for a settlement of the account between the two firms, and that the representatives of F. Lorenz and of T. H. Stewart be decreed to pay to the plaintiff the balance found due from the first to the second firm. After answers were filed, the cause was referred to Mr. Bailey, as "examiner to take the testimony, and as master to report thereon." After a careful examination, he submitted an elaborate report, to which a number of exceptions were filed; but the court, after consideration, did order, adjudge, and decree that there is due and owing by the first firm of Lorenz, Stewart, & Co. to the second firm of the same name the sum of \$64,332.89, with interest from the date of the report; that of said amount there be first paid to the complainant the sum of \$56,853.31, with interest from the date of the report; and that the residue, with interest, be paid to the second firm of Lorenz, Stewart, & Co.; and that the said sum of \$64,332.89, with its interest as aforesaid, be paid to the parties aforesaid by the administrators of said Frederick Lorenz and Thomas H. Stewart, deceased, respectively, out of the partnership estate and effects of the first firm of Lorenz, Stewart, & Co.; and in case the same should not be sufficient for that purpose, then out of the individual separate estates of the said Frederick Lorenz and Thomas H. Stewart in the hands of their respective administrators. **AN**

appeal was taken from this decree. The other facts are stated in the opinion.

Charles Shaler, Thomas McConnell, and W. H. Lowrie, for the plaintiff.

Hamilton and Acheson, for the defendants.

By Court, AGNEW, J. In the articles of copartnership between Frederick Lorenz and Thomas H. Stewart, composing the first firm of Lorenz, Stewart, & Co., there was a covenant "that, in case of the death of any of the partners, the business shall be continued by the surviving partner to the first day of August next ensuing, in the same manner as though such death had not taken place; and then an inventory of the stock and assets shall be taken, and the business of the firm closed up in such manner as may be decided upon by the survivor of the personal representatives of the deceased partner."

Upon a careful examination of the evidence and facts reported by the master, his conclusion cannot be resisted, that the mode adopted to close the business of the old firm, through the instrumentality of the new firm of Lorenz, Stewart, & Co., was decided upon by the survivor, T. H. Stewart, and the administrators of F. Lorenz. The opposite presumption is not reasonable. It cannot be believed that the administrators took no notice of the formation of the new firm, of which one of the administrators and a son and legatee of Lorenz were members; of its occupancy of the property of the old firm and appropriation of its stock and material, the collection and payment of its debts, and suffered the survivor to embark afresh in business, using the entire assets of the old firm without a complaint or note of alarm. Gray, an administrator, and a partner also in the new firm, stood where his eye was constantly upon the winding up of the affairs in which he had a sworn interest, as the personal representative of Lorenz, while F. R. Lorenz, another administrator, was in the constant and daily habit of visiting the common office of the two firms, where all the books were, and of inspecting them.

Besides, the admissions of all the administrators, including Mrs. Lorenz, come in aid of the inferences derived from the facts. Their assent to the mode adopted of closing the business of the old firm was an act personal to themselves, and subject to the same rule of proof which belongs to other cases of personal acts. Their joint settlement of an account claiming a credit for an unsettled outstanding interest belonging to

the estate of Lorenz, in the hands of the new firm, and the production of evidence in support of it by showing the relations between the old and new firms, were pregnant proof of both knowledge and assent. To this is added their express recognition in their answers upon the attachment of the indebtedness of the old firm to the new.

It is no sufficient reply to all this that the charges of the new firm against the old stand in the name of the surviving partner. As between the firms this was right. He was the party legally designated to represent the interests of the defunct firm, and therefore the form of the charges was properly consulted in being made against him. But this affords no disproof of the fact as between the survivor and the representatives of Lorenz, that they united in adopting this mode of closing the business of the old firm through the instrumentality of the new. The articles devolved upon them the duty of deciding upon the mode of closing the business, and with all this evidence of their adoption of this mode, and none whatever of any other mode, how can the conclusion be resisted that all did accede to it?

Nor is it a fair statement of the fact to say that Stewart, as surviving partner, by the terms of the articles of copartnership of the new firm, sold to it the stock, rented the works, and contracted with it for the collection and payment of the debts of the old. In these articles he acted as a member of the new firm, and not in the capacity of the representative of the old. It is true, his consent as such representative may be inferred from his entering as a member of the new firm into a common contract with the others concerning these affairs of the old. But the new firm acquired its title to the property and stock of the old, not through their articles of copartnership, but through acts outside of it. It followed, but did not precede, the transfer. The case is therefore left to rest upon the very facts and circumstances relied upon by the master, for his conclusion that this mode of closing the affairs of the old firm had been decided upon by the survivor and the administrators.

This fact being established, the whole argument of the appellant falls, founded upon the want of power in the survivor, the abuse of his trust, and that he and the administrators became executors *de son tort*.

It is a fallacy that a *devastavit* (if it be such) of actual administrators, invested with lawful powers as such, can be con-

verted into the act of executors *de son tort*, or that they can be so characterized. They may be made liable for any *devastavit* they commit, but their rightful acts as administrators cannot be challenged. It is therefore an error to assume that when acting under the authority of a covenant of the deceased in relation to the settlement of his partnership affairs, all their acts are to be viewed with suspicion and distrust. The act we are now considering is not the continuing of the partnership after Lorenz's death, but is the mode of closing its concerns.

This mode was to be decided upon by the administrators after the expiration of the partnership. The objections, therefore, to the sufficiency of the account taken by the master, founded upon the alleged illegality of the acts and declarations of the survivor and administrators, are not sustained. The evidence furnished by the books, vouchers, and testimony of Mr. Hersh, the clerk, taken in connection with the acts and declarations of all these parties, seem to be sufficient to sustain the report.

It is urged that the individual estate of Lorenz is not liable for any debts contracted by the surviving partner in carrying on the business after his death. We cannot assent to the proposition that a covenant for the continuation of a partnership for a reasonable period after death is not binding on the estate of the dying partner, if assented to and carried out by the personal representatives. The covenant descends upon all who take the estate by succession, and will justify his continuing the business, whatever may be his own right to refuse to continue, and to incur thereby personal liabilities as a partner. The covenant to continue, and thereby to prevent loss, following a sudden demise and winding up, is certainly no exception to the general rule which devolves contract liabilities upon the estate and prefers creditors to those who are to succeed to the estate. There is no reason why such a covenant should be less binding than a bond of indemnity, or of suretyship where the breach happens after death, or a covenant to do acts or pay money at a future day. It is not like a covenant, such as between master and apprentice, involving a personal qualification. The nature of the covenant excludes this consideration as waived in the contemplation of the parties in making the covenant. Nor is it one of those exceptional cases growing out of the nature of the subject-matter of the contract or the relation of the parties. But the point has been solemnly decided upon full argument and mature consideration by this

court in *Gratz v. Bayard*, 11 Serg. & R. 41, that a partnership may be continued after death by an agreement to this effect, and that in such case death does not work a dissolution. To the authorities therein referred to we may add Toller on Executors, 166, 167; Collyer on Partnership, 5, 6, 120, 121; Story on Partnership, sec. 196; *Scholefield v. Eichelberger*, 7 Pet. 594; *Burwell v. Mandeville*, 2 How. 576; 2 Williams on Executors, 1226, 1227, 1243, 1244. It flows as a corollary from this proposition that the assets of the deceased partner are liable to the debts created in the business, either generally or specifically, according to the nature and extent of the fund devoted to the continuance of the partnership.

In Toller's Law of Executors, 166, 167, it is said the articles may contain a proviso for continuing the partnership, or the testator may by his will direct his executors to carry on his trade after his death, either with his general assets, or appoint a specific fund, to be severed from the general mass of his property for that purpose. This is the solution of all the cases cited in the paper-book as adverse to the proposition stated. *Burwell v. Mandeville*, 2 How. 560, *Ex parte Garland*, 10 Ves. 110, and *Pitkin v. Pitkin*, 7 Conn. 307 [18 Am. Dec. 111], are all instances of partnership continued by will, and a specific portion only of the estate appropriated to the continuance. Instead of denying the principle that the general assets may be liable, it is admitted in its full breadth, and in each case the decision is put upon the extent of the fund or portion of the assets devoted to the continuation of the partnership. The only difference between these cases and *Ex parte Richardson and Hodson*, 3 Madd. 138, is, that in this last case the partnership agreement provided if one should die he should name in his will a successor to continue business on behalf of his estate, and the partner dying appointed his executors. But the decision in that case was put expressly upon the ground that all that was meant to be left to carry on the trade was the capital invested, and that in all beyond the executrix acted in breach of her trust. It was also a fact in the case that the two executors who were appointed in the will jointly with the executrix refused to carry on the partnership, and renounced in consequence of her determination to proceed with it.

In the present case neither the covenant nor the will of Lorenz limited the fund to be made liable by the continuation of the partnership business after his decease, and we dis-

cover nothing therefore to restrain the general liability of his estate.

It is contended, that even if a balance be due by the old firm to the new, one third of it is due by Stewart to himself, and that equity forbids this sum to be collected from the estate of Lorenz. This, however, is neither a correct statement of the fact nor the equity of the case. Stewart did not owe it to himself, but owed it to a firm, and the assets of this firm belong, not to him, but to its creditors. It is averred in the bill, and not disproved or denied, that the new firm of Lorenz & Co. became insolvent, and its property was sold by the sheriff, while the assignment of this debt from the old to the new firm was expressly made to the plaintiff to secure payment of the debts of the latter.

It is also said, that the new firm can have no claim except upon the balance due Stewart, on a full settlement between the members of the old firm as partners, because the new firm acted as agent of the surviving partner. But the fact on which this position is founded fails, for we have already seen that the new firm was the instrumentality chosen by the administrators of Lorenz as well as Stewart, to close up the business under the clause in articles of copartnership requiring this to be done.

But in reference to both the points last mentioned, it is to be added that the equity of the new firm entitling it to payment from the estate of all the partners in the old does not rest alone on the selection by the survivor and the administrator of this mode of closing up. It is true that that which constitutes the initiatory step voluntary payment of the debts of another creates no liability. But the request to pay being established by the mode thus adopted, the payment itself becomes the true source of the equity, and the new firm therefore is clothed with the equities of the creditors of the old, whose debts have been paid. The debts paid were claims, not only upon the assets of the old firm, but upon the individual estate of each partner. It is this right to payment out of the estate of each partner with which the new firm became invested, and being insolvent can successfully prosecute in equity for the benefit of its own creditors. And to enforce it, it is no longer necessary to rely on the principle of equity, that a partnership debt is several as well as joint, and can be recovered out of the assets of a deceased partner without proof of the insolvency of the survivor. This is clearly the modern

doctrine, as shown in 2 Williams on Executors, 1240, 1241. But since the act of the 11th of April, 1848, secs. 3, 4, Brightly, 776, 777, P. L. 6, 7, the distinction between the primary liability of the survivor and the secondary liability of the estate of the deceased partner, arising from the insolvency of the survivor, no longer exists in law or equity. A judgment may be executed or suit brought against the executors or administrator of the deceased partner without averring or proving insolvency or recovery against the survivor. There is therefore no legal barrier to the administration of any equity against the estate of the deceased partner arising from the claims of creditors: *Moore's Appeal*, 34 Pa. St. 411.

These remarks cover all the positions taken by the appellant, and affirm the decree of the court below. But we have been referred to a statement of the account as made by James J. Gray, one of the partners in the new firm in 1860, to show that instead of a balance from the old firm to the new of \$48,046.94 in 1858, as found by the master, there was a balance of but \$30,189.31, or as stated in the written copy furnished us, \$30,190.27. This discrepancy, however, chiefly arises from the rejection by the master of a credit to the administrators of F. Lorenz, May 1, 1860, of \$19,628.58, the master adding that it is not insisted on. We might perhaps discover a reason for the rejection in the fact that the assignment to Laughlin of the debt due by the old firm to the new was made on the 31st of December, 1857, while the credit given by Gray was not until 1860; but the inquiry becomes useless, from the fact that the credit was relinquished as stated by the master, and that among the nineteen original and supplemental exceptions to his report, no trace of any to the rejection of this item is to be found."

There is also a debt of Stewart, the surviving partner, to the old firm, of \$7,370.16, among the uncollected assets, which was mentioned in the argument, and its non-collection urged as a reason why the report of the master should be revised. But the collection of this debt depended on the voluntary payment of it by Stewart. He did not owe the debt to the new firm, but to the old, and therefore could not be sued by the former. Besides, the debt was individual on his part, and he was also the sole survivor. Even the act of 1838 authorizing one firm to sue another where there is a partner common to both applies, as held in *Hall v. Logan*, 34 Pa. St. 331, only to firm and not individual debts, and a judgment recovered under this act

cannot be levied upon the separate estate of a partner: *Tassey v. Church*, 6 Watts & S. 465 [40 Am. Dec. 575]. But aside from the want of a remedy against Stewart, the equity of the creditors of the old firm, to which the new became subrogated by payment, is superior to the equities between Stewart and Lorenz, which can be settled only by an account taken between their estates. These debts are an unconditional charge against the estate of Lorenz, and his estate must pay them: *Moore's Appeal*, 34 Pa. St. 411.

Upon the whole case we see nothing to correct, and therefore affirm the judgment.

CARRYING ON OF PARTNERSHIP BY REPRESENTATIVE OF DECEASED PARTNER. — It is a general rule of law that the death of one of the members of a firm dissolves the partnership: Story on Partnership, sec. 195; Parsons on Partnership, 441; *Craoohay v. Maule*, 1 Swanst. 495, 508; *Scholefield v. Eichelberger*, 7 Pet. 586, 594; *Burwell v. Mandeville's Ex'r*, 2 How. 560, 576; *Forrester v. Oliver*, 1 Ill. App. 259; *Stanwood v. Owen*, 14 Gray, 195; *Jenness v. Carleton*, 40 Mich. 343; *Exchange Bank v. Tracy*, 77 Mo. 599; *Citizens' M. I. Co. v. Ligon*, 59 Miss. 305; *Gratz v. Bayard*, 11 Serg. & R. 41; *Cock v. Carson*, 45 Tex. 429; *Alexander v. Lewis*, 47 Id. 481; *Davis v. Christian*, 15 Gratt. 11; see note to *Childs v. Hyde*, 77 Am. Dec. 115, where this subject is discussed; and note to *Powell v. North*, 56 Id. 517. The personal representatives of a partner do not in that capacity succeed to the state and condition of the deceased partner: Story on Partnership, sec. 5. The Roman law carried this rule so far that it would not permit a partnership to be continued beyond the death of a partner, even by stipulations to that effect in the contract of partnership, or by a provision in the will of the deceased partner: Id., sec. 196. But the common law permits the partners, by express stipulation in the articles of copartnership, to provide that the partnership shall continue after the death of one of the partners, and it also allows a partner by his will to provide that the partnership may continue after his decease: Id.; *Craoohay v. Maule*, 1 Swanst. 495, 508; *Warner v. Cunningham*, 3 Dow, 76; *Skirving v. Williams*, 24 Beav. 275; *Tillotson v. Tillotson*, 34 Conn. 335; *Stanwood v. Owen*, 14 Gray, 195; *Brasfield v. French*, 59 Miss. 632; *Edwards v. Thomas*, 66 Mo. 468; *Gratz v. Bayard*, 11 Serg. & R. 41; *Leaf's Appeal*, 105 Pa. St. 505, 513, citing the principal case; *McNeish v. Hulless Oat Co.*, 57 Vt. 316; *Davis v. Christian*, 15 Gratt. 11. But strictly speaking, the partnership thus carried on after the death of the partner is not a continuation of the old partnership, but a new partnership formed pursuant to the stipulations of the contract, or to the provisions of the will of the deceased partner. Parsons, in discussing this question, says: "What is inaccurately called provision against the dissolution of the partnership is an agreement that if either party dies his property shall remain in the firm and in the business, or that his executors shall carry on the business for the benefit of his children; or that his children, or some one of them, or some other person, shall, immediately on his death, take his place in the firm, and become partner in his stead. All these agreements and arrangements, and all that can be made for a similar purpose, are in fact only bargains for the creation of a new partnership when the old one ceases to exist. And so, too, all arrangements or contracts which may be made between the surviving partners and the rep-

representatives or appointee of the deceased have for their effect only the formation of a new partnership, which, upon some terms or other, takes the stock and carries on the business of the old one": Parsons on Partnership, 439.

And Martin, C., in delivering the opinion of the court in *Exchange Bank v. Tracy*, 77 Mo. 600, said: "The carrying on of the business of a partnership after the decease of one of the partners, in obedience to a direction or contract of the deceased to that effect, is not in its true nature a continuation of the old partnership, although it is thus inaccurately termed. It is necessarily the creation of a new partnership, and for that reason ought not to exist in the absence of satisfactory proof of a direction of the deceased to that effect. The fact that the deceased may have contemplated the so-called continuation of the firm after his death, as before, will not authorize the executor to continue the business in the absence of a direct provision to that effect."

LIABILITY OF DECEDENT'S ESTATE AND OF HIS REPRESENTATIVE WHEN PARTNERSHIP BUSINESS IS CONTINUED AFTER DEATH OF PARTNER. — Neither the surviving partner nor the representative of the deceased partner, simply as such, has any authority to continue the business of the partnership so as to impose any new burdens upon the estate of the decedent. If the surviving partner continues the business, it will be at his own risk, and he will be liable to account for the profits made thereby, or to be charged with interest on the deceased partner's share, besides bearing all the losses: Story on Partnership, sec. 343; Lindley on Partnership, 4th ed., 977; *Costley v. Towles*, 46 Ala. 660; *Bernie v. Vandever*, 16 Ark. 616; *Forrester v. Oliver*, 1 Ill. App. 259; *Remick v. Ihmig*, 42 Ill. 342; *Goodburn v. Stevens*, 1 Md. Ch. 420; S. C., 5 Gill, 1; *Washburn v. Goodman*, 17 Pick. 519; *Millard v. Ramadell*, Harr. (Mich.) 373; *Jenness v. Carleton*, 40 Mich. 343; *Exchange Bank v. Tracy*, 77 Mo. 594; *Skidmore v. Collier*, 8 Hun, 50; *Brown's Appeal*, 89 Pa. St. 139. So if the personal representative of a deceased partner sees fit to embark or continue the funds of the decedent's estate in the partnership, without having authority to do so from the will or contract of the decedent, or from a court of equity, he himself becomes a partner, and is liable as such personally, and not in his representative character, for the debts of the company: *Edgar v. Cook*, 4 Ala. 588; *Alsop v. Mather*, 8 Conn. 584; S. C., 21 Am. Dec. 703; *Citizens' M. I. Co. v. Ligon*, 59 Miss. 305; *Gibson v. Stevens*, 7 N. H. 357; *Stedman v. Feidler*, 20 N. Y. 446; *Wightman v. Townroe*, 1 Maule & S. 412; *Burwell v. Mandeville's Ex'r*, 2 How. 560.

It is, however, competent for a partner to provide in his will for the continuation of the partnership after his death. The contract of partnership, too, may stipulate that the business of the firm shall continue for a certain length of time after the death of any of the partners. And it seems that a court of equity may appoint a person to carry on the partnership for a time for the benefit of the infant heirs of a deceased partner: See *Powell v. North*, 56 Am. Dec. 513, note 517, where this subject is discussed at length. But in all these cases the agreement or authority has to be clearly made out, and only the property of the estate which was engaged in the business at the time of the deceased partner's death, or that which is by the terms of the will authorized to be used in the business, will be liable for the debts of the partnership business carried on after his death: Collyer on Partnership, sec. 602; Story on Partnership, sec. 201 a; 3 Redfield on Wills, p. 257, sec. 8; *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, 3 Madd. 138; *Scholefield v. Kichelberger*, 7 Pet. 586, 594; *Burwell v. Mandeville's Ex'r*, 2 How. 560, 576; *Smith v. Ayer*, 101 U. S. 320; *Jones v. Walker*, 103 Id. 444; *Stamwood v. Owen*, 14 Gray, 195; *Exchange Bank v. Tracy*, 77 Mo. 594; *Gratz v. Bayard*,

11 Serg. & R. 41; *Alexander v. Lewis*, 47 Tex. 481; *Davis v. Christian*, 15 Gratt. 11. Mr. Justice Story, in the case of *Burwell v. Mandeville's Ex'r*, 2 How. 560, 576, delivered a very able opinion, in which he said: "By the general rule of law, every partnership is dissolved by the death of one of the partners. It is true that it is competent for the partners to provide by agreement for the continuance of the partnership after such death; but then it takes place in virtue of such agreement only as the act of the parties, and not by mere operation of law. A partner, too, may by his will provide that the partnership shall continue notwithstanding his death; and if it is consented to by the surviving partner, it becomes obligatory, just as it would if the testator, being a sole trader, had provided for the continuance of his trade by his executor, after his death. But then in each case the agreement or authority must be clearly made out; and third persons, having notice of the death, are bound to inquire how far the agreement or authority to continue it extends, and what funds it binds, and if they trust the surviving party beyond the reach of such agreement or authority or fund, it is their own fault, and they have no right to complain that the law does not afford them any satisfactory redress." Parties who deal with an executor exercising his power of disposition of the personal assets of the estate in his hands to raise money for the business of a firm are bound to look into his authority, and are held to a knowledge of all the limitations which the will, as well as the law, puts thereon: *Smith v. Ayer*, 101 U. S. 320. A direction in a will that a testator's trade shall be carried on after his death does not of itself authorize the employment in the trade of more of the testator's property than was employed at the time of his decease: *McNeillie v. Acton*, 4 De Gex, M. & G. 744; *Cutbush v. Cutbush*, 1 Beav. 184; *Brasfield v. French*, 59 Miss. 632. It is a well-established rule that the general assets of a deceased partner's estate shall not be held liable for debts contracted by the firm subsequent to his death, unless it is very clear that it was his intention that they should be made chargeable. Said Mr. Justice Story, delivering the opinion of the court in *Burwell v. Mandeville's Ex'r*, 2 How. 577: "Nothing but the most clear and unambiguous language, demonstrating in the most positive manner that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely to limit it to the funds embarked in that trade, would justify the court in arriving at such a conclusion." These views are fully sustained by the authorities: Story on Partnership, sec. 201 a; Parsons on Partnership, 441; *Kirkman v. Booth*, 11 Beav. 273; *Ex parte Garland*, 10 Ves. 110; *Edgar v. Cook*, 4 Ala. 588; *Pitkin v. Pitkin*, 7 Conn. 307; S. C., 18 Am. Dec. 111; *Stanwood v. Owen*, 14 Gray, 195; *Hagan v. Barksdale*, 44 Miss. 186; *Brasfield v. French*, 59 Id. 632; *Exchange Bank v. Tracy*, 77 Mo. 594; *Lucht v. Behrens*, 28 Ohio St. 240, citing the principal case; *Cock v. Carson*, 45 Tex. 429; *Alexander v. Lewis*, 47 Id. 481; *Davis v. Christian*, 15 Gratt. 11; *Smith v. Ayer*, 101 U. S. 320; *Jones v. Walker*, 103 Id. 444.

POWERS OF SURVIVING PARTNER: See note to *Shiells v. Fuller*, 65 Am. Dec. 295, where this subject is discussed at length.

BORTZ v. BORTZ AND WIFE.

[43 PENNSYLVANIA STATE, 382.]

WHETHER WRITING IS EXECUTED CONVEYANCE OR ONLY EXECUTORY DEPENDS ON INTENTION of the parties, as collected from the instrument itself; where it is doubtful upon its face, light may be shed upon it by the attending circumstances.

AGREEMENT FOR SALE OF LAND IN CONSIDERATION OF SUM OF MONEY TO BE PAID ANNUALLY during the lifetime of the grantor and his wife for their support, containing a provision for the increase or reduction of such annual sum should it be too little or too much for that purpose, which contains the formal words of a present deed of conveyance distinctly conveying the land, and which is duly executed and acknowledged, possession being delivered under it, is an executed conveyance, vesting the title in the grantee; and the fact that such grantee is a married woman will not prevent the estate from vesting in her by the conveyance, though encumbered with a condition.

EJECTMENT by John Bortz against Solomon Bortz and Margaret, his wife, for sixty acres of land. The plaintiff, who was then the owner of the land, on the 12th of September, 1857, entered into the following agreement with Margaret Bortz: "Article of agreement made," etc., "witnesseth: That the said John Bortz and Eve, his wife, for and in consideration of the sum of ten dollars to them in hand paid on the first day of January, A. D. 1859, and the further sum of eighty dollars on the first day of January, A. D. 1860, and also the sum of ninety dollars per year, to commence on the first day of January, 1861, to be paid annually every subsequent year during the lifetime of the said John Bortz and Eve, his wife; and provided the said sum of ninety dollars is not sufficient to maintain the said John Bortz and Eve, his wife, the amount shall be increased to such further sum as shall maintain them in their customary manner of living; and provided the above stipulation shall be more than sufficient to maintain the said John and Eve Bortz during their lifetime or lifetimes according to their custom of living, then the sum of ninety dollars shall be reduced so as to comply with this present agreement; the said John Bortz and Eve, his wife, to have the privilege of keeping one horse and cow during their lifetime; and the said John and Eve Bortz shall surrender all privilege of farming, raising stock, etc., unto the said Margaret Bortz; and the said John and Eve Bortz, by these presents, have granted, bargained, sold, aliened, enfeoffed, released, and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, convey, and confirm, unto the said Margaret Bortz, her heirs

and assigns, all that certain messuage or tract of land containing sixty acres adjoining lands with Robert Borland, Daniel Wilyard, and John McIlvain: to have and hold the said messuage or tenements and tract of sixty acres of land, hereditaments, and premises hereby granted or mentioned, or intended so to be, with the appurtenances, unto the said Margaret Bortz, her heirs and assigns, to the only proper use and behoof of the said Margaret Bortz, her heirs and assigns forever; also to have and to hold all the personal property of whatever kind after the death of the said John and Eve Bortz. In witness whereof," etc. This agreement was duly executed by both parties, acknowledged and recorded. On the back of the paper there were three receipts from John Bortz to Margaret for three years' rent, dated May, 1858, April, 1860, and January, 1861. The other facts are stated in the opinion.

H. D. Foster and H. C. Marchand, for the plaintiff.

H. P. Laird, for the defendants.

By Court, AGNEW, J. We look upon the instrument of writing of the 12th of September, 1857, between John Bortz and wife and Margaret Bortz, as an executed conveyance. The rule stated in *Sherman's Lessee v. Dill*, 4 Yeates, 298 [2 Am. Dec. 408], and by Sergeant, J., in *Kenrick v. Smick*, 7 Watts & S. 45, and Strong, J., in *Ogden v. Brown*, 33 Pa. St. 249, is, that from the intention of the parties, as collected from the instrument itself, we must judge whether the writing is an executed conveyance or only executory. Where it is doubtful upon its face, light may be shed upon it by the attending circumstances.

In determining this intention, *ex visceribus*, the first rule is to inquire whether the language imports a present conveyance, or whether, collecting all its parts, it contemplates a further assurance to pass the title: *Grey v. Packer*, 4 Watts & S. 17; *Garver v. McNulty*, 39 Pa. St. 484. The instrument in the case before us, both in the granting part and in the *habendum* and *tenendum*, uses the ordinary formal language of a deed of conveyance, and most distinctly conveys the title, in the usual mode, by the past and present tense. Now, unless this express language is countervailed by some other part of the writing, or by some fact or circumstance set forth in it, no conclusion can be drawn contrary to its explicit terms.

The only fact that appears from which any inference can be drawn is, that the consideration expressed is to be paid in

future annually during the lives of John Bortz and Eve, his wife, with a provision for increase or reduction in case the annual sum should be too little or too much for their support in their customary manner of living. But no inference as to the character of the conveyance can be legally drawn from the fact of future payment, unaccompanied, as here, by any conditions, covenants, or restrictions relating to the title, to restrain its present passing. It has been well said by Lowrie, C. J., in *Neas's Appeal*, 31 Pa. St. 294, and by Thompson, J., in *Garver v. McNulty*, 39 Id. 483, that the instrument may be executed as to one party and executory only as to the other. This was manifestly the character of the instruments in the cases of *Cook v. Trimble*, 9 Watts, 15, *Grey v. Packer*, 4 Watts & S. 17, *Hepburn v. Snyder*, 3 Pa. St. 72, and *Garver v. McNulty*, 39 Id. 483, above referred to. In all these cases, these writings were decided to be executed conveyances by the grantor, while the grantee's covenants for the consideration were executory.

In *Cook v. Trimble*, 9 Watts, 15, the conveyance was in consideration of \$160 and a comfortable support and living, to be given to the grantor, his wife and daughter, during their natural lives. This case is an authority upon another point, which touches the construction of the writing, to wit, that the stipulation for a living imported no condition, but was merely the recital of the consideration. *Garver v. McNulty*, 39 Pa. St. 483, is an authority directly in point in this case. There the instrument was an agreement, was signed by both parties, and contained a condition precedent that the grantee was to furnish the grantor with another house and garden. In the opinion of the court, delivered by Thompson, J., none of these features were deemed sufficient to take from the instrument its character as an executed conveyance. It was also in consideration of a comfortable support during natural life.

To these cases we add *Hiester v. Green*, 48 Pa. St. 96 [*ante*, p. 569], opinion by Woodward, C. J., in which it was held that a recital in a deed that the purchase-money was unpaid and was to be paid annually created no lien on the property conveyed. The executed character of the deed on part of the grantor, and executory on part of the grantee, were fundamental elements in that case.

Kenrick v. Smick, 7 Watts & S. 41, *Williams v. Bentley*, 27 Pa. St. 294, and *Ogden v. Brown*, 33 Id. 247, furnish precedents of instruments construed to be executory only, but are

not opposed to the construction given to the agreement in this instance. On the contrary, they recognize the rule of interpretation now declared, and decide the instruments to be executory, because the intention that they should be is fairly to be drawn from the collected import of the writing.

The fact that Margaret Bortz was a married woman when the agreement was made will not prevent the estate from vesting in her by the conveyance. She is capable of taking a conveyance to herself, and even the fact that it is encumbered with a condition will not prevent its vesting the title: 2 Bla. Com. 203; *Patterson v. Robinson*, 25 Pa. St. 81; *Ramborger v. Ingraham*, 38 Id. 146; *Black v. Galway*, 24 Id. 18. The verdict being for the defendant, the mistake of the court below as to the character of the instrument did no injury.

The judgment is affirmed.

TO DETERMINE WHETHER INSTRUMENT IS TO OPERATE AS EXECUTED CONVEYANCE or only as an executory contract, the court will look to the intention of the parties, and this is to be sought for in every part of the contract: See *Stewart v. Lang*, 78 Am. Dec. 414, note 418, where other cases are collected.

CONDITION SUBSEQUENT IN DEED: See *Ransom v. School District No. 5*, 83 Am. Dec. 670, note 675; *Emerson v. Simpson*, 82 Id. 168, note 172. To create an estate upon condition subsequent, which will revert to the vendor upon the breach of the condition, the intention must be expressed by apt words in the deed: *Rudy's Appeal*, 94 Pa. St. 344, citing the principal case.

DEED TO MARRIED WOMAN: See *English v. Beehle*, 82 Am. Dec. 126, note 128. A married woman can take a deed with consent of her husband: *Dundas's Appeal*, 64 Pa. St. 332, citing the principal case. A married woman can take property by purchase: *Walker v. Coover*, 65 Id. 433, also citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Shirley v. Shirley*, 59 Pa. St. 272.

KEEN v. HARTMAN AND WIFE.

[48 PENNSYLVANIA STATE, 497.]

GENERAL PRINCIPLE THAT FOR FRAUD OR OTHER TORT OF MARRIED WOMAN ACTION MAY BE MAINTAINED against her and her husband is applicable only to actions brought for wrongs done by her that are torts pure and simple, that is, torts the substantive basis of which is not her contract.

ACTION WILL NOT LIE AGAINST HUSBAND AND WIFE FOR HER FALSE AND FRAUDULENT REPRESENTATIONS that she was a widow at the time she executed to the plaintiff a bond and mortgage, in exchange for which he gave to her promissory notes to a large amount against a third person.

WHERE PLAINTIFF'S INJURY CONSISTS IN HIS INABILITY TO REALIZE what a *feme covert* gave him reason to expect from her undertaking, it is not a case of pure and simple tort.

ACTION on the case. The facts are stated in the opinion.

Lucas Hirst, W. L. Hirst, and F. C. Brewster, for the plaintiff in error.

John A. Owens, for the defendants in error.

By Court, **STRONG, J.** This was an action of trespass upon the case, in which the declaration averred that Mary Ann Hartman, one of the defendants, had falsely, deceitfully, and fraudulently represented to the plaintiff that she was a widow named Mary Ann Coleman, and that she was not a married woman, when in truth she was not a widow, but had been secretly married four days previously to the other defendant. The declaration further averred that by reason of this false and deceitful statement the said Mary Ann had obtained from the plaintiff promissory notes made by one George Moore, which were the property of the plaintiff, and of great value, and that the plaintiff delivered to her those promissory notes in exchange for a bond and mortgage executed and delivered by her as a widow and unmarried woman. At the trial a verdict was returned for the plaintiff, but the court arrested judgment, being of opinion that such an action could not be sustained. Herein it is insisted there was error.

It is no doubt a general principle that for the fraud or other tort of a married woman an action may be maintained against her and her husband. At the same time, it is a principle equally general that a wife is incapable of making a contract that can be enforced in any manner against her. Her disability, though like that of an infant, is even more complete. These principles must both be maintained in the full extent of their meaning. What, then, is their meaning as related to each other? Many torts are founded upon duties growing out of contracts. The practical effect of maintaining an action for such torts is the same as would be that of maintaining actions in form *ex contractu*, brought for the breach of the contracts themselves. But the disability, and consequent immunity, of a *feme covert* are substantial, and not formal. So is it with an infant. Hence it has always been held that the contract of neither can be enforced substantially by any form of action, for if it could, the legal immunity would cease to be a personal protection, and would exist or not, according to the remedy which a plaintiff might choose to adopt. Necessarily, therefore, the principle first stated is to be understood as applicable only to actions brought for wrongs done by the wife,

which are what are sometimes denominated torts *simpliciter*, in other words, torts the substantive basis of which is not the wife's contract. It is essential to the maintenance of any action for a tort that there be not only a wrongful act done by the defendant, but an injury to the plaintiff. If the injury to the plaintiff consist in his inability to realize what a *feme covert* gave him reason to expect from her undertaking, it is not a case of pure and simple tort. The real injury then flows from her non-compliance with her engagement, and an action to recover compensation for it, if maintainable, gives equal effect to her contract, no matter in what form the action may be brought, whether in form *ex contractu* or *ex delicto*. It practically enforces it. It is not strange, therefore, that it was early ruled that an infant is not liable for a false representation by which he induces a party to contract with him. This was decided in *Johnson v. Pye*, 1 Sid. 258. The case is also reported in 1 Lev. 169, and in 1 Keb. 913. And there can be no distinction in this respect between the case of an infant and that of a married woman. None is recognized. In *Cooper v. Witham*, 1 Lev. 247, S. C., 1 Sid. 375, and 2 Keb. 399, we find an action brought against a husband and wife, for that she being *covert*, affirmed herself to be *sole*, and requested the plaintiff to marry her, averring it to have been done maliciously, and with intent to deceive the plaintiff, whereupon he married her, whereby he was disturbed in conscience, and put to great charge by the husband. It was held, on motion in arrest of judgment, that the action would not lie, and the ground of the decision was, that the matter upon which the action was based "sounded in contract."

Precisely the same doctrine was maintained in the modern case of *Adelphi Loan Association v. Fairhurst*, 9 Ex. 422, a case not distinguishable from the present. There it was ruled an action will not lie against a husband and wife for a false and fraudulent representation by the wife to the plaintiff, that she was *sole* and unmarried at the time of her signing a promissory note as surety to him for a third person, whereby the plaintiff was induced to advance a sum of money to that person. The case was fully argued and decided after consideration and review of the authorities. Pollock, C. B., in delivering the judgment of the court, while admitting the general liability of the husband and wife for her torts, said: "But when the fraud is directly connected with the contract of the wife, and is the means of effecting it, and parcel of the same

transaction, the wife cannot be responsible, and the husband be sued for it together with the wife. If this were allowed, it is obvious the wife would lose the protection which the law gives her against contracts made by her during coverture, for there is not a contract of any kind which a *feme covert* could make whilst she knew her husband to be alive that could not be treated as a fraud. For every such contract would involve in itself a representation of her capacity." In this state no case has arisen until the present in which this precise question has been determined, but the principle that governs the English cases has been asserted and applied in actions for torts brought against infants. It was maintained with much force of argument by Gibson, C. J., in *Wilt v. Welsh*, 6 Watts, 9, and many authorities were cited. It finds some support also in *Penrose v. Curren*, 3 Rawle, 351 [24 Am. Dec. 356]. We have other cases to the point that though an action may be in form as for a tort, yet if the subject of it be based upon a contract there can be no recovery, when an action on the contract directly would fail, and this whether the defendant be an infant or an adult.

In view of these authorities and of the reasons by which they are sustained, we are brought to the conclusion that the present plaintiff's action cannot be sustained, that no cause of action was set forth in the declaration, and that it was right to arrest the judgment upon the verdict.

It may seem hard that a person injured by the fraud of a married woman, consummated through the agency of her contract, should be without civil remedy, but it is necessary to the conservation of that protection which the law throws over her during her coverture, against being bound by her contracts, and the rule entails no more loss upon him than does his inability to enforce her contract directly.

Judgment affirmed.

LIABILITY OF HUSBAND FOR WIFE'S TORTS: See *Ball v. Bennett*, 83 Am. Dec. 356, note 358. The liability of a married woman for her torts is confined to those denominated torts *simpliciter*, and her immunity, like that of an infant, is substantial, and cannot be taken away by a mere change in the mode of enforcing the liability: *Glidden v. Strupler*, 52 Pa. St. 406, citing the principal case. A married woman who falsely and fraudulently, and with intent to deceive, represents to a person that she is a *feme sole*, whereby he is induced to accept her bond and mortgage in exchange for promissory note owned by him, is not thereby estopped from setting up her coverture to defeat a recovery on her bond: *Klein v. Caldwell*, 91 Id. 144, citing the principal case.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

NATIONAL MUTUAL FIRE INS. Co v. YEOMANS.

[8 RHODE ISLAND, 25.]

DUE ORGANIZATION AND RIGHT OF MUTUAL INSURANCE COMPANY TO ACT UNDER ITS CHARTER is presumed in the absence of countervailing proof in a suit by the company against one of its members to recover assessments, — if, indeed, the defendant is not, in such case, estopped from denying them.

ABSENCE OF AFFIRMATIVE SHOWING IN MINUTE-BOOK OF MUTUAL INSURANCE COMPANY that one million dollars of insurance has been subscribed for, as required by the charter of the company to entitle it to insure, does not even tend to prove that such subscription has not been made.

ASSESSMENT ON MUTUAL INSURANCE POLICY IS NOT INVALIDATED because before the issuance of such policy other policies had issued bearing written agreements signed by the secretary of the company, or by brokers who procured the policies, that the holders should not be liable to assessment, when it is proved that the agreements were unauthorized by the board of directors and repudiated by them, and that the holders were assessed and paid their assessments like other policy holders, and that the amount of the assessment on such subsequent policy was not at all affected by such agreements.

BY-LAW OF CORPORATION PROVIDING FOR ADDITION OF TEN PER CENT PER MONTH to the amount of unpaid assessments is invalid where the charter provides that the amount of unpaid assessments — which, of course, includes simple interest — shall be recovered by action, for a by-law cannot add to the rule of damages fixed by the charter; but a verdict for the amount of assessments, with ten per cent per month interest, will be allowed to stand upon the condition that the plaintiffs release, upon the record, the excess of the verdict over the amount of the assessments and simple interest.

ASSUMPSIT by a mutual fire insurance company, to recover from one of its members, in contribution to its losses, assess-

ments made upon him under four policies of insurance held by him. The defendant upon the trial objected to the introduction of any evidence as to his liability until the plaintiffs had proved or agreed to prove their right to organize and legal organization under their charter, and contended that no recovery could be had until it was shown that, under the fifth section of their charter, the sum of one million dollars had been subscribed to be insured by the associates before any policies were issued or before the date of the defendant's policies. He claimed further that the plaintiffs had no legal existence or standing in court, since it did not appear from the record of the first meeting of the corporation, produced by the defendant, that any persons named in the act of incorporation were present at the meeting, though it was called by one of them, or that any vote was taken by such persons to associate any others with them, or that any persons purporting by the record to have been elected directors or officers of the corporation were subscribers for any sum to be insured by the corporation. And he also offered the record-book of the corporation to show that it did not appear from it that the sum of one million dollars had been subscribed to be insured by the associates prior to their issuing policies or before the date of the defendant's policies; but the court refused to admit it for this purpose. The twenty-sixth article of the by-laws of the company provided that all assessment should be advertised for thirty days, before the expiration of which time they must be paid, and in default of such payment that the company might add "ten per cent of the assessment to itself and collect the same for each month's delay." The eighth section of the charter provided that upon the failure of any member to pay the amount which might be assessed upon his insurance policy for thirty days after demand of payment, he should be liable to the suit of the corporation therefor. The secretary of the company testified that the penalty of ten per cent per month had never been enforced against any except those whom the company had sued for an assessment, though many persons had not paid their assessment until some time after the expiration of notice. Whereupon the defendant requested the court to instruct the jury to return a verdict for the defendant, on the ground that the company sought to enforce against him what they had not required of others, and thereby destroyed the mutuality of the contract between him and themselves. He also requested the instruction that the

ten per cent per month penalty could not be recovered, because it had not been enforced against other delinquents, and because the by-law providing therefor was illegal, being unauthorized by the charter of the company and inconsistent with the laws of the state, and because it was unreasonable, unconscionable, and oppressive. The court overruled the objections taken and refused the instructions requested, and the defendant excepted. The jury returned a verdict for the plaintiffs for the full amount claimed, and the defendant brought his exceptions to this court for review in matter of law. In other respects the opinion states the case.

Hayes, for the defendant and exceptant.

James Tillinghast, for the plaintiffs.

By Court, AMES, C. J. The main questions raised by this record are questions of evidence merely. To say, in a suit by a mutual insurance company against one of its members, the company being a corporation *de facto* at least, whose corporate existence is acknowledged by the action and contract of the defendant, and which is permitted to act as a corporation by the legislature whose charter it affects to wield, that the due organization and right of the company to act under its charter is, in the absence of proof to the contrary, to be presumed, is far within the line both of principle and precedent; and the only question has been, whether the defendant is not estopped to deny it, thus incidentally, for the purpose of avoiding an obligation into which he has deliberately entered, and upon the faith of which others have become co-insurer and co-insured with him. If upon such a ground he could avoid payment of his assessments,—the fund to which those members who have sustained losses by fire must look for their indemnity,—it would be very much like permitting him to practice a fraud upon them. It would be very difficult to contravene, upon principle, the decision of the supreme court of Massachusetts in *Appleton Mutual Fire Ins. Co. v. Jesser*, 5 Allen, 446, that the lawfulness of the organization of a corporation *de facto*, for mutual insurance, cannot be impeached collaterally in an action to recover an assessment. At least, the learned judge who tried this case below did not err in holding that, in the absence of proof to the contrary, it was to be presumed that the plaintiffs had done all those things under their charter which were required to enable them to act as a corporation for mutual insurance, and that the fact

that the minute-book of the corporate proceedings did not affirmatively show that these requisites had been complied with did not control this presumption. The fact that this book did not contain evidence that, before the issuing of the policy, the sum of one million dollars had been subscribed to be insured did not even tend to prove that such subscription had not been made. It is not the place in which we should expect to find such a subscription, and was properly excluded as proving by what was not in it that no such subscription had been made. The subscription probably preceded the organization as the basis upon which the corporation was entitled to insure.

Another exception presented to us is, that the judge who tried this cause did not, though requested, instruct the jury that, because of four policies issued by the plaintiffs during the period in which the defendant effected his policies with them, two bore indorsed a written agreement signed by the secretary of the company, and two signed by the brokers who procured them, that the holders of those policies were not to be liable to assessment, the assessments upon the defendant's policies were void. When the bill of exceptions finds that these agreements were wholly unauthorized by the board of directors, and were repudiated by them; that the policy holders were assessed notwithstanding the agreements, and paid their assessments as others; and that the assessments sought of the defendant were not all affected in amount by this irregular conduct on the part of the secretary and of the brokers,—it would be difficult to find a reason why the agreements should release the defendant from an obligation expressly assumed by him, unless upon the logic that a wrong attempted and repented of by one sanctions a similar wrong persisted in by another.

The remaining exceptions turn upon the twenty-third article of the by-laws of this mutual insurance company, which is alleged to be illegal and oppressive, and, as construed in practice, unequal and unjust. Whatever may be the merits of ten per cent per month upon unpaid assessments as a means of inducing their prompt payment, the eighth section of the charter, which gives to the company an action to recover them if they shall remain unpaid thirty days after demand, prescribes, as we read it, that their amount is to be recovered in such action,—which, of course, includes simple interest. The by-law cannot, in this particular, add to the rule of damages

thus fixed by the charter; and we shall do entire justice to both parties by allowing the verdict to stand, on condition that the plaintiffs release, upon the record, the excess of the verdict over the proper amount of the same, thus ascertained. This will take away from the defendant all cause of complaint, since it will place him upon the footing of those most favored by the company in the exercise of the discretion that they seem to have assumed as to the enforcement of the penalty of this by-law. Upon the above release, let judgment below be affirmed, and the clerk issue execution for the balance thereof, with costs.

LEGALITY OF ORGANIZATION OF CORPORATION CANNOT BE COLLATERALLY ATTACKED: *Goodrich v. Reynolds*, 83 Am. Dec. 240, and note 243; *Ohio and Miss. R. R. Co. v. McPherson*, ante, p. 128, and note. Estoppel to deny corporate existence by contracting with corporation: *Snyder v. Studebaker*, 81 Id. 415, and note 419.

SECRET AGREEMENT TO RELEASE ONE SET OF SUBSCRIBERS or one particular subscriber to stock in corporation is unfair and a fraud upon other subscribers, and will not be enforced: *Foy v. Blackstone*, 83 Am. Dec. 246, note 249; note to *Parker v. Thomas*, 81 Id. 400.

NO LEGAL ASSESSMENT CAN BE MADE ON STOCK OF CORPORATION whose charter fixes a sum as the minimum for the capital stock until that amount of stock is subscribed, in good faith, by men apparently able to pay, and for shares to bear equal burdens with the others: *Lewey's Island R. R. Co. v. Bolton*, 77 Am. Dec. 236, and note 240.

RIGHT OF CORPORATION TO MAKE BY-LAWS IS UNQUESTIONABLE, but they must be conformable and subordinate to its charter: *St. Luke's Church v. Mathews*, 6 Am. Dec. 619; *Leggett v. N. J. M. & B. Co.*, 23 Id. 728; *Matter of Long Island R. R. Co.*, 32 Id. 429; *Cahill v. Kalamazoo etc. Co.*, 43 Id. 457; *Palmetto Lodge v. Fleming*, 49 Id. 604.

WHITAKER v. HARTFORD, PROVIDENCE, AND FISH-KILL RAILROAD COMPANY.

[8 RHODE ISLAND, 47.]

INTEREST MAY BE RECOVERED BY WAY OF DAMAGES ON OVERDUE COUPONS from the time of demand and refusal of payment.

DEBT to recover the amount of certain coupons or interest warrants attached to bonds given by the defendants to the plaintiff. The coupons, which were by their terms payable at stated periods, were all overdue at the time of the commencement of the suit. Before the suit, the plaintiff demanded payment of the coupons, and upon refusal instituted this suit, and demanded interest on the coupons.

Hayes, for the plaintiff.

Currey, for the defendants.

By Court, AMES, C. J. The suit is for the amount of the interest coupons only, the bonds not being due. These neither by their terms nor by custom are payable with interest, but are to be presented for and given up on payment. Until presented, the defendants could have been in no default for non-payment; but after it, the coupons being due, the refusal to pay was a clear breach of the contract, and interest from the time of demand and refusal is recoverable by way of damages. Railroad bonds, with interest coupons attached, are purchased for investment and income, and when the latter is not paid at the time promised, no well-considered authority, properly understood, forbids what principle requires, that the damage from delay of payment should be compensated by interest on the amount due, computed from the day of demand and refusal.

INTEREST ON OVERDUE COUPONS. — This subject is fully treated in the note to *Morris Canal etc. Co. v. Fisher*, 64 Am. Dec. 441, 442, citing the principal case 441; see also *City of Pekin v. Reynolds*, 83 Am. Dec. 244, and note 246.

ALDRICH v. HOWARD.

[8 RHODE ISLAND, 125.]

ACTION DIES WITH PERSON AT COMMON LAW in case of an injury to the property or person of another for which damages only can be recovered.

ACTION ON CASE FOR ERECTING AND MAINTAINING STABLE so near hotel as to be nuisance thereto survives the death of the defendant pending the action, and may be prosecuted against his executor summoned to defend it, by virtue of a statute providing that causes of action and actions of trespass, and trespass on the case for damages to the person, or to real and personal estate, shall survive the death of the plaintiff or defendant therein.

CASE for erecting and maintaining a stable, contrary to law, so near the hotel of the plaintiff as to occasion a nuisance thereto and depreciate its value. The defendant died pending the action, and his death being suggested, his executor was summoned to defend the case. He moved to dismiss the action on the ground that it did not survive the death of the defendant.

James Tillinghast and Bradley, for the motion.

Currey, contra.

By Court, BRAYTON, J. This action was brought against the defendant, now deceased, to recover damages alleged to have been done to the real estate of the plaintiff by means of certain nuisances, kept up and maintained by the defendant upon his premises adjoining. In one count of the declaration (it is not necessary to cite other similar counts), the plaintiff alleges that he was the owner and proprietor of a hotel, called the Aldrich House, of great value for sale or for lease, and paying a large annual rent. And the deceased, being the owner of land adjoining, erected thereon and maintained a livery-stable, and kept a large number of horses therein, and created noisome smells and vapors uncomfortable and unwholesome, which were caused to come upon and into the said building, and incommoded the guests, tenants, and inhabitants in their occupation of the said premises of the plaintiffs; and that the lessees were hindered from carrying on their business as beneficially as they might, whereby the value of said premises has been reduced, and the plaintiff has been obliged to reduce the rent of the same. The executor of the defendant now moves that the action be dismissed, on the ground that such action does not by law survive, but has become abated by the death of the defendant.

By the common law, in the case of an injury to the property of another, or to his person, for which damages only could be recovered in satisfaction, the action died with the person; and whenever the action was founded upon a tort, or was *ex delicto*, or where the declaration imputes a tort either to the person or property of another, and the plea must be not guilty, the maxim, *Actio personalis moritur cum persona*, applies: 1 Saund. 216, note 1; 2 Williams on Executors, 1470. Although this was modified, to some extent, by statute 4 Edw. III., c. 7, in favor of executors and administrators, by an equitable and liberal construction of its terms, giving a remedy for injuries done to the personal estate of the deceased, the modification did not extend to injuries done to the person or to the freehold; neither did that statute give any remedy against an executor or administrator for a tort committed by the deceased against the person or property of another; and so the remedy against the personal representatives for a tort committed by the deceased remained here as at common law, until the pas-

sage of the act contained in Revised Statutes, c. 176, sec. 10, by which it is declared that "causes of action and actions of trespass and trespass on the case for damages to the person, or to real and personal estate," shall survive the death of the plaintiff or defendant therein. Section 12 of the same chapter provides that in case of such suit against an executor or administrator of a party originally liable, the plaintiff shall recover only the value of the goods taken, or the damage actually sustained, without any vindictive or exemplary damages, or damages for any alleged outrage to the feelings of the injured party.

The question raised by this motion is, whether this action is saved by the provisions of the sections of the Revised Statutes referred to. The defendant insists that it is not within the reason of the act, and that the act was only intended to apply to actions in which the injury results directly to the person, or to specific property, real or personal, and to injuries to the property itself; and in no other case was the action or cause of action intended to survive against the executor or administrator of the deceased wrong-doer.

The statute provides not only for cases of trespass, where the injury is not only the direct but the immediate effect of a wrongful act forcibly done, but for actions of the case where the damages are not immediate, but to be recoverable must be the natural and proximate consequence of the wrongful act alleged. If by direct injury to the property is intended an injury to it thus resulting as the natural and proximate consequence of the act charged against the deceased, the injury here complained of would seem to be of that character, and to be the natural and proximate consequence of the nuisance charged. If it be any injury whatever to the real estate, it flows, as alleged, as naturally and directly as any injury may be supposed to flow from any other wrongful act.

But it is urged that the injury here alleged is no injury to the real estate of the plaintiff, but, as charged, an injury personal to the plaintiff.

This is an instance of a large class of cases falling under the denomination of torts to real property corporeal, and may be found classed as nuisances to real estate. The declaration in this case is framed to accord with that class of cases in the books of forms. It rests upon the same principles as an obstruction of one's lights; for erecting a smith's shop to the annoyance of a dwelling; for obstructing an entrance to

the plaintiff's dwelling; for keeping a slaughter-house near the plaintiff's house, whereby the plaintiff, a school-master, lost many scholars; for carrying on the business of a candle-maker next the plaintiff, by which the air was corrupted and his house rendered unfit for habitation. These are all treated as injuries to the real estate, and not injuries merely personal to the plaintiff. The twelfth section of the act has carefully provided that though the actual damage done to the person or to the real or personal estate may be recovered, no damages shall be assessed for any alleged injury to the feelings of the injured party. If there be any allegation of such injury, it cannot be given in evidence in this suit.

The cases referred to on the part of the defendant do not appear to support the positions to which they were cited. The damage is here alleged to be done to specific real estate. It does not fall within the case of *Read v. Hatch*, 19 Pick. 47, which was an action for falsely representing the credit of a trader to be good, and in which Shaw, C. J., said: "The statute must be confined to damages done to some specific property of which one may be the owner"; mere pecuniary loss is not regarded as damage done to real estate. Nor is it affected by the case of *Barrett v. Copeland*, 20 Vt. 244, which was for a false return to a writ, whereby the plaintiff's suit was defeated. In this case, Bennet, J., delivering the opinion of the court, says: "The statute must be confined to actions to recover damages to some specific property, and not to one for a mere wrongful act prejudicial to the assets; and that though the loss of the action was consequential on the false return, the assets only were indirectly affected. In *United States v. Daniel*, 6 How. 11, the action was for a false return, as in the preceding case, not for an injury to any specific property, but to assets only. The case of *Zabriskie v. Smith*, 13 N. Y. 322 [64 Am. Dec. 551], was, like that of *Read v. Hatch*, 19 Pick. 47, for false representation of credit, and governed by the same rule. The case, however, simply decided that the action would not survive by the common law nor by statute 4 Edward III. It does not appear that any other statute was in question. The case of *Stillman v. Hollenbeck*, 4 Allen, 391, was for false affirmation of a garnishee, and governed by the case of *Read v. Hatch*, 19 Pick. 47. *Cutting v. Tower*, 14 Gray, 183, was an action for deceit in the sale of poisoned grain, which the plaintiff fed to his horse, whereby the horse died. The case was determined on the ground that the injury alleged

was not the natural and proximate consequence of the deceit, but resulted only incidentally and collaterally from it; and but for the act of the plaintiff in feeding it to the horse, the damage alleged would not have happened. *Smith v. Sherman*, 4 Cush. 408, was an action for breach of promise to marry, in which it was held that this was not an injury to the person within the meaning of the statute of Massachusetts. Our statute does not treat cases of contract; and a breach of contract could hardly be deemed an injury to the person of the contracting party, though it might be an outrage to the feelings,—a kind of injury which the statute expressly excludes. There are two other cases cited, *Nettleton v. Dinehart*, 5 Cush. 543, which was an action for malicious prosecution, and the case of *Walters v. Nettleton*, 5 Id. 544, which was an action for a libel. The injury here was not to the person, nor was it to any specific property; if either case affected more than the injured feelings, it was the general assets only.

We are of opinion that the case stated in this declaration is within the purview of this act, and that the action survives; and the motion to dismiss must be overruled.

ABATEMENT OF ACTIONS BY DEATH OF PARTY: See *Miles v. Miles*, 64 Am. Dec. 362, and note 370; *Petts v. Ison*, 56 Id. 419, and cases cited in the note 420. The death of the defendant abates an action of trespass for a direct and immediate injury to a chattel, and the action cannot be revived against his personal representative: *Petts v. Ison*, *supra*.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

LAIRD v. WINTERS.

[27 TEXAS, 440.]

DECREE ORDERING SHERIFF TO PLACE PURCHASER AT JUDICIAL SALE IN POSSESSION of the land purchased can have no effect upon the rights of any person who was not a party to the decree, and does not authorize the sheriff to turn such a person out of possession by virtue of the writ of possession.

PERSON WHO HAS BEEN TURNED OUT OF POSSESSION OF LAND by a writ issuing by virtue of a decree to which he was in no sense a party may proceed by action of forcible entry and detainer to recover the possession; and ought not to be driven to an action in which the title may be called in question, nor even to a motion in the court from which the writ issued.

ACTION of forcible entry and detainer by Winters against Laird. Judgment in the justices' court was rendered against the defendant, and he removed the cause by *certiorari* to the district court, alleging in his petition that the justice of the peace had excluded, when offered in evidence on the trial, a transcript of a decree of the district court of Gonzales County and a writ of possession issued thereunder, by virtue of which the defendant, who had purchased the land under the decree, had been placed in possession by the sheriff; and also that the plaintiff had no title to the land. This decree, which was recited in the petition, was rendered in a suit for partition instituted by G. F. and S. E. Henry against the heirs of Barney Randle, to which the plaintiff Winters was in no way a party. The plaintiff by way of answer pleaded that he had held peaceable and adverse possession of the land for more than five

years next preceding his ejection by the defendant under a title bond executed to him by G. F. Henry and wife, under which bond he had paid Henry and wife more than a third of the purchase-money. Upon the trial the court instructed that no question of title was involved, and that if force had been used in putting the defendant in possession the verdict should be for the plaintiff. Verdict for the plaintiff, and defendant's motion for a new trial overruled, whereupon defendant appealed.

A. N. Mills, for the appellant.

John H. Robson, for the appellee.

By Court, BELL, J. We are of opinion that the decree rendered by the district court of Gonzales County, at the fall term, A. D. 1856, in the suit by G. F. and S. E. Henry against the heirs of Barney Randle, in so far as the said decree orders the sheriff to place the purchaser at the commissioners' sale in possession of the tracts of land purchased by them respectively, could have no effect upon the rights of any person who was not a party to said decree, and did not, therefore, authorize the sheriff to execute the writ of possession in such manner as to turn out of possession any one not a party to the decree. The general subject of the manner in which writs of possession ought to be executed, and the remedies to which parties who are injured by their improper execution are entitled, is one of much interest, and not altogether free from difficulties; and we do not wish to be understood as going any further than to say that, in a case like the present, a person who has been turned out of his possession by a writ issuing by virtue of a decree to which he was in no sense a party, may proceed by action of forcible entry and detainer to recover the possession, and ought not to be driven to an action in which the title may be called in question, nor even to a motion in the district court from which the writ issued, to be restored to his possession.

The judgment of the court below is affirmed.

Judgment affirmed.

JUDGMENT IS BINDING UPON PARTIES AND PRIVIES ONLY: *Cameron v. Cameron*, 82 Am. Dec. 652, and note 658; *Hovey v. Chase*, 83 Id. 514. But in an action of forcible entry and detainer against three persons, where a verdict of guilty was rendered as to two and a verdict of not guilty as to the third, it was held that the verdict was conclusive that the plaintiff was peaceably in the actual possession of the premises at the time of the entry, and that, such possession being incompatible with the lawful possession of another, the

verdict was conclusive against the possession of the third person: *Fremont v. Crippen*, 70 Am. Dec. 711.

UNDER WRIT OF RESTITUTION IN ACTION, OF FORCIBLE ENTRY AND DETAINER, the sheriff is authorized to dispossess parties who, though strangers to the proceedings, have entered into the possession after the commencement of the action: *Fremont v. Crippen*, 70 Am. Dec. 711, and note 714; but if the party was in possession before the commencement of the action, the rule is otherwise: *Garrison v. Saignac*, 69 Id. 448, and note 450.

ALLISON v. SHILLING.

[27 TEXAS, 450.]

IT IS GENERAL RULE IN EQUITY PLEADING THAT ALL PERSONS ARE NECESSARY PARTIES to a suit whose interests are to be affected by it.

PARTY SEEKING SPECIFIC PERFORMANCE OF CONTRACT IN WHICH HE HAS NO PRIVITY must make all those through whom he claims the right of enforcing the contract parties to his suit.

WHERE ONE HAS MADE HIS TITLE BOND TO ANOTHER, who assigns it to another, who executes his own title bond to another, who makes his title bond to the plaintiff, the latter, in a suit against the first vendor for specific performance of his contract, must join all the others as parties.

BOND OF HUSBAND TO CONVEY AT FUTURE DAY TRACT OF LAND then the homestead of himself and wife is not an unlawful undertaking, although a specific performance of the bond cannot be decreed while the premises remain a homestead.

WIFE WHO HAS VOLUNTARILY LEFT FORMER HOMESTEAD, and accompanied the husband to and accepted the new homestead provided by him, can no longer insist that her homestead rights still attach to and control the abandoned premises, or resist the enforcement of a contract by the husband to convey the former homestead, made while it was occupied as such.

SUIT by Shilling against Allison to compel the defendant to execute to the plaintiff a deed for a certain tract of land. The petition alleged that the defendant executed and delivered his title bond to one Greenwood, binding himself thereby to convey to the latter title to two tracts of land as soon as patents should be issued by the state. Afterwards, Greenwood assigned all his rights in the land to one Washington; and the latter afterwards made and delivered to one Jones his bond for title to one of the tracts, binding himself to convey to Jones, or his heirs or assignees, a good title thereto as soon as he should receive title from Greenwood. Afterwards, Jones made and delivered to the petitioner his bond to convey title to the latter tract upon his payment of the balance of the purchase-money. Petitioner had fully paid Jones his purchase-money, and defendant Allison had received all of his purchase-money, and had procured a patent for the land, but refused to convey title

to the petitioner. The defendant demurred specially, on the ground that Jones was shown by the petition to be equitably interested in the suit, and was a necessary party thereto. The defendant's wife, Sarah Allison, intervened, and prayed that the bond of the defendant Allison be canceled and annulled, on the ground that the land in question was the homestead of the intervenor and her husband, and that she had never given her consent to the sale of it. She alleged that shortly after the execution of the bond her husband removed to other land, and that she followed and lived with him; but that she never accepted the same as a homestead in lieu of the premises in question. The plaintiff replied to the petition of intervention, that Allison and his wife, the intervenor, had acquired another homestead since the execution of the bond. In his amended answer, the defendant again demurred and excepted, because there was no privity of contract alleged in the petition showing any right in the plaintiff to maintain his suit against the defendant, and because it was apparent from the petition that there were other necessary parties who should be before the court. These exceptions were all overruled. And upon the trial the court instructed the jury that if they believed that Mrs. Allison and her husband moved from the premises sold, and acquired another homestead, she could not now set up her homestead right to the land in question, because her homestead right could not attach to two distinct tracts of land at the same time, and the verdict should be for the plaintiff and against the intervenor. Verdict and judgment were for the plaintiff, and the defendant's motion for a new trial being denied, he appealed.

H. C. Pedigo, for the appellant.

Willson, for the appellee.

By Court, MOORE, J. The exception of the defendant in the court below, who is the appellant in this court, to the plaintiff's petition for the non-joinder of proper parties as defendants, should have been sustained. There is no privity between the parties to this suit in the contract for which a specific performance is asked. The plaintiff is not the assignee of the bond which he seeks to enforce against the defendant. His right to maintain this suit, and to claim that the land described in the defendant's bond shall be decreed him, rests upon his equitable title from those who acquired a like title to it under the defendant's vendee, the obligee in the bond

upon which the plaintiff brings his suit. In considering who are the proper parties to suits by assignees upon bonds, Mr. Story lays down the following rule: "The true principle would seem to be, that in all cases where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the extent and validity of the assignment is not doubted or denied, and there is no remaining liability in the assignor to be affected by the decree, it is not necessary to make the latter a party. But where the assignment is not absolute and unconditional, or the extent or validity of the assignment is disputed or denied, or there are remaining rights or liabilities of the assignor which may be affected by the decree, then he is not only a proper but a necessary party": Story's Eq. Pl., sec. 153. It is a general rule in equity pleading, that all persons whose interest is to be affected by a suit are necessary parties to it. The plaintiff in this case seeks to divest the title out of the defendant, not in favor, however, of the party to whom he is bound by his bond or its assignment, but in favor of one claiming under a contract to which he is a stranger, and, it must be presumed, ignorant as to its stipulations, and unadvised whether they have been fulfilled. Under these circumstances, we think, on principle and policy, the plaintiff should be required to make those through whom he claims the right of enforcing a contract in which he has no privity parties to his suit. The defendant should not be left to the danger of future liability to the obligee or assignee of his bond after the title has been divested out of him in favor of a stranger.

There is another question presented in the record upon which, though not affecting the present result of the case, it is proper we should express an opinion. After the institution of this suit, the wife of the defendant in the court below intervened, and asks that the specific performance of the contract set forth in the defendant's bond be refused, and said bond canceled and annulled. The ground upon which this action of court is invoked is, that the land in question was, at and previous to the execution of said bond, the homestead of herself and husband; that she was at that time, and still continues, unwilling to its sale, and refused to join in or consent thereto. In reference to this petition, the plaintiff alleges—and the proof sustains his statement—that immediately after the execution of the bond by the defendant, the intervenor removed with him to another tract of land in the neighborhood, upon

which he had taken a pre-emption claim, where they made improvements of equal comfort and value with those on the place from which they removed. In view of these facts, we are of the opinion that the failure of the intervenor to consent to the sale of the land, or to join in the execution of the bond, and her dissatisfaction with the transaction, and unwillingness to part with the premises, furnish no grounds for withholding a decree, or for canceling the bond as prayed for by her. Although a specific performance of the bond could not be decreed while the premises remained the homestead of the defendant and his wife, yet the bond of the husband to convey at a future day a tract of land, although the homestead of himself and his wife, is not an unlawful undertaking. "It is true," as is said in the case of *Brewer v. Wall*, 23 Tex. 585 [76 Am. Dec. 76], "while the premises which the party might so undertake by his bond to convey remain the homestead of himself and his wife the courts would not decree a specific performance of the contract.

"But if the wife should die before the time expressed for the performance of the bond; or if, before the expiration of that time, the obligee in the bond and his wife should acquire another homestead, then the courts might decree the specific performance of the bond, because any legal obstacle to a specific performance would be removed." It is evident, after the wife has voluntarily left the former homestead, and accompanied the husband to and accepted the new one provided by him, she can no longer insist that her homestead rights still attach to and control the abandoned premises. The object of the constitution, in this particular, is to secure the wife and family a home against the improvidence of the husband; but it did not intend to jeopardize the rights of others, or to leave her in doubt as to what premises her rights attached, if, during coverture, she had, at different times, migrated with her husband from one homestead to another. The judgment is reversed, and the cause remanded.

Reversed and remanded.

ALL PARTIES INTERESTED SHOULD BE JOINED IN SUIT IN EQUITY: *Moore v. Hood*, 70 Am. Dec. 210, and note 216; *Blackwell v. Blackwell*, 70 Id. 556, note 562. In a suit by a sub-purchaser for specific performance, the intermediate vendors through whom he has acquired his equity are generally necessary parties: *Henderson v. Pickett's Heirs*, 16 Am. Dec. 130; *Hays v. Hall*, 30 Id. 530; see also *Moore v. Fitz Randolph*, 29 Id. 208. So all persons whose interests are to be affected by a decree to compel a conveyance of land

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alleged to be held in trust are necessary parties to the suit: *Huffman v. Cartwright*, 44 Tex. 301, citing the principal case.

HUSBAND'S BOND TO CONVEY HOMESTEAD AT FUTURE DAY IS NOT VOID, but specific performance will not be decreed while the premises remain a homestead. If, however, the wife die before the expiration of the time for the performance of the bond, or if, before that time, another homestead be acquired, every legal obstacle is removed, and specific performance may be decreed: *Brewer v. Wall*, 76 Am. Dec. 76, and note 80. The principal case is cited to this effect in *Wright v. Hays*, 34 Tex. 261. It is also cited to the point that the surviving husband can sell the homestead although there are minor children surviving who are heirs of his deceased wife: *Dawson v. Holt*, 44 Id. 179.

ABANDONMENT OF HOMESTEAD. — This subject is treated in the note to *Taylor v. Hargous*, 60 Am. Dec. 607-615. The acquisition of a new homestead elsewhere is regarded as conclusive evidence of abandonment: *Taylor v. Hargous*, 60 Id. 610, citing the principal case.

COOKE v. BREMOND.

[27 TEXAS, 457.]

ACQUISITIONS OF EITHER JOINT OR SEPARATE LABOR of husband or wife become community property.

ALL PROPERTY ACQUIRED BY PURCHASE OR APPARENT ONEROUS TITLE is *prima facie* community property, whether the conveyance be in the name of the husband or of the wife, or in the names of both.

LAND CONVEYED TO HUSBAND OR WIFE OR BOTH BY DEED OF PURCHASE is presumed to be community property, and parol evidence is not admissible to explain or modify such deeds so as to ingraft upon the property after it has passed to innocent purchasers a trust to their detriment; though as between the parties to such deeds, their privies in blood, or purchasers without value or with notice, their legal import may be affected by parol evidence.

INSPECTION OF DEED CHARGES PARTY WITH NOTICE OF THOSE FACTS ALONE which its contents import.

INSPECTION OF DEED TO MARRIED WOMAN WHICH EXPRESSES VALUABLE CONSIDERATION on its face authorizes the inference that the land is community property, and subject to the disposal of the husband alone.

FACT THAT CONVEYANCE EXPRESSING VALUABLE CONSIDERATION WAS TAKEN IN NAME OF WIFE imposes no burden upon the purchaser from the husband of inquiring as to the equities of the husband and wife in respect to the property.

SUIT by plaintiffs as heirs at law of Catherine N. Cooke, who died intestate, against Bremond for the cancellation of a deed executed to the defendant by Abner Cooke, the husband of Catherine, in 1846. The plaintiffs alleged that the land in question was conveyed to Catherine N. Cooke by one Nichols, who was her brother, in consideration of natural love and affection, by a deed of gift which expressed a nominal money

consideration; that in fact there was no money or other consideration for the deed, except natural love and affection; that the deed was duly recorded; that the defendant had placed his deed from Abner Cooke, the father of the plaintiffs and the husband of Catherine, upon record; and that it constituted a cloud upon the title which descended at the death of Catherine to the plaintiffs as her heirs. The defendant demurred to the petition, and his demurrer was sustained. The deed to Catherine N. Cooke expressed a money consideration of two hundred dollars, and was duly recorded. The plaintiffs assign error.

Henderson and Johnstone, for the plaintiffs in error.

D. J. Baldwin, for the defendant in error.

By Court, MOORE, J. The court below did not err in sustaining the demurrer to the plaintiffs' petition. Our whole system of marital rights is based upon the fact that acquisitions, either of the joint or separate labor or industry of the husband or wife, become common property; and as a general rule deducible from this principle, all property acquired by purchase or apparent onerous title, whether the conveyance be in the name of the husband or of the wife, or in the names of both, is *prima facie* presumed to belong to the community. It is true that it is now a well-established and long-recognized rule of procedure in our judicial system, as between the parties to such deeds, their privies in blood, purchasers without value or with notice, to affect the legal import of such deeds by parol evidence: *Smith v. Strahan*, 16 Tex. 314 [67 Am. Dec. 622]; *Higgins v. Johnson*, 20 Id. 389 [70 Am. Dec. 394]; *Dunham v. Chatham*, 21 Id. 231 [73 Am. Dec. 228]. But we know of no principle upon which such evidence can be received for the purpose of explaining or modifying such deeds after the property has passed into the hands of innocent purchasers, and thereby ingrafting upon it a trust to their detriment. Such a doctrine would go far to destroy the utility of written evidences of title to land, and the registration of conveyances for the purpose of notice. The alleged fact that the defendant in error examined the deed to Mrs. Cooke before he purchased the lots is immaterial. The inspection of a deed only charges a party with notice of the facts which its contents import. An inspection of this deed authorized the defendant in error to infer that the property was a part of the community estate of Cooke and wife, and justified him in deal-

ing with it as such. The statute authorizes the husband, during its continuance, to dispose of all community property. That the title of it when acquired by the community was taken in the name of the wife imposes no additional burden upon the purchaser of inquiring as to the equities of the husband and wife in respect to it.

There is no error in the judgment, and it is therefore affirmed.

Judgment affirmed.

WHAT IS COMMUNITY PROPERTY, AND WHEN PRESUMPTION THAT PROPERTY IS COMMUNITY MAY BE REBUTTED. — *Origin and Nature of Community System.* — The doctrine of community property originates from the civil law, but is borrowed directly, in those states where it prevails, from the Spanish or Mexican law: *Hall v. Hall*, 52 Tex. 298; *Meyer v. Kinzer*, 12 Cal. 247; S. C., 73 Am. Dec. 539. This system of property rights in connection with the marital relation has been adopted in California, Louisiana, Nevada, and Texas, in all of which states, before their acquisition by the United States, the Spanish or Mexican law prevailed: See *Fuller v. Ferguson*, 26 Cal. 567; *Scott v. Ward*, 13 Id. 471; *Saul v. His Creditors*, 5 Martin, N. S., 569; S. C., 16 Am. Dec. 212; *Burr v. Wilson*, 18 Tex. 370; *Hall v. Hall*, *supra*. Their legislatures have substantially enacted the rules of Spanish jurisprudence, and though the law of these states as it now stands differs in many particulars from the Spanish law, and the laws of the several states differ in some respects, nevertheless they all embrace the main features and substantial elements of the community system as expounded in the Spanish law: *Burr v. Wilson*, 18 Tex. 370; S. C., Dallam, 101; *Packard v. Arclanes*, 17 Cal. 537; *Scott v. Ward*, 13 Id. 471; *Saul v. His Creditors*, 5 Martin, N. S., 569; S. C., 16 Am. Dec. 212. And in the earlier decisions in these states frequent reference is made to the Spanish law for illustration and enlightenment in the application of the system adopted from it, the common-law authorities being entirely inapplicable with respect to the law of community property: *Meyer v. Kinzer*, 12 Cal. 247; S. C., 73 Am. Dec. 538; *Edrington v. Mayfield*, 5 Tex. 366; *Hall v. Dotson*, 55 Id. 522.

The community system, as contained in the body of the Spanish jurisprudence and in the statutes of the states adopting it, recognizes a relation existing between husband and wife, respecting their property, somewhat similar to a partnership; but it is not a universal partnership, as is the case in several countries in Europe. It does not embrace property owned by the parties before marriage, nor all of their future acquisitions, but those only which are attained by the industry, labor, or "negotiation" of one or both of the parties; nor is it material with respect to the right of either to equal participation in such gains and acquisitions as become common property how much the other party may have contributed toward their production: *Wilkinson v. Wilkinson*, 20 Tex. 242; *Panaud v. Jones*, 1 Cal. 514. The marital relation in respect to property acquired during its existence is in fact a community, "of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution in case of surviving the other," per Field, J., in *Meyer v. Kinzer*, 12 Cal. 247; S. C., 73 Am. Dec. 539.

COMMUNITY PROPERTY, DEFINITION OF. — *Spanish Law.* — Under the Spanish and Mexican law, property acquired by the husband and wife during the marriage, and while living together, whether by onerous or lucrative title, and that acquired by either of them by onerous title, belonged to the community, and was denominated *gananciales*; while property acquired by either of them by lucrative title solely constituted the separate property of the party making the acquisition. The fruits, profits, and increase of separate property also belonged to the community. By onerous title was meant that which was created by valuable consideration, as the payment of money, the rendition of services, and the like, or by the performance of conditions or the payment of charges to which the property was subject. Lucrative title was created by donation, devise, or descent. All property owned before marriage by either husband or wife was separate property: *Scott v. Ward*, 13 Cal. 413; *Panaud v. Jones*, 1 Id. 514; *Fuller v. Ferguson*, 26 Cal. 540; *Wilkinson v. Wilkinson*, 20 Tex. 242; *Yates v. Houston*, 3 Id. 433, 452. Property acquired during marriage by lucrative title, such as by legacy, inheritance, or donation made separately to one spouse, is not community property, for these acquisitions are not the fruit of the joint and several labor or diligence of the parties, but arise from the personal merits of the donee: *Wilkinson v. Wilkinson*, 20 Id. 242. And community property under the Spanish law included not only property purchased with the funds of the community; but also that purchased with the separate funds of either party, and it was immaterial in whose name, whether of the husband or wife, the purchase was made. The exception was maintained, however, that property purchased with the proceeds of the sale of separate property, or property exchanged for separate property, remained separate property: *Parker v. Chance*, 11 Id. 513; *Scott v. Maynard*, Dallam, 551; *Davenat v. Le Bodon*, 1 La. 520; *Andrew v. Bradley*, 10 La. Ann. 606.

California. — The first law of California defining the property rights of husband and wife was the act of 1850, which, except in a few particulars, contained a clear and succinct statement of the Spanish law: *Panaud v. Jones*, 1 Cal. 514. This statute provided that "all property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be community property"; and also that "the rents and profits of separate estates of either husband or wife shall be deemed common property"; but this latter provision was held to be unconstitutional: *Lewis v. Johns*, 24 Id. 98; S. O., 85 Am. Dec. 49; *George v. Ransom*, 15 Cal. 324. The code adopts the judicial interpretation of the constitution, and provides that all property of either husband or wife owned before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is separate property; and all property other than separate property acquired after marriage by either husband or wife or both is common property: Civ. Code, secs. 162, 164. Therefore in California all property acquired after marriage by either husband or wife is community property, except when acquired by gift, bequest, devise, or descent; *Meyer v. Kinzer*, 12 Cal. 247; S. O., 73 Am. Dec. 538; or representing the rents, issues, or proceeds of separate property: See *infra*.

Nevada. — The law of Nevada is the same as that of California: *Compiled Laws*, 152.

Texas. — The law of 1840 limited separate property to lands and slaves, the increase of such slaves, and the wife's paraphernalia, and made all other property brought by either party into the marriage common property. And under this law a wagon and cattle owned by the wife before marriage became com-

mon property: *Portis v. Parker*, 22 Tex. 701. In 1848, however, the law was changed, and it now provides that all property, both real and personal, of the husband or wife owned or claimed before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands and slaves thus acquired, shall be separate property; and all property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise, or descent, shall be deemed the common property of the husband or wife: Texas Rev. Stats. 2851, 2852.

The basic principle of the community system is, that whatever is acquired by the joint efforts of the husband and wife shall be their common property: *De Blane v. Lynch*, 23 Tex. 25; *Magee v. White*, 23 Id. 191; *Forbes v. Dunham*, 24 Id. 611. But it is not necessary to prove that property is in fact the product of the joint efforts of the husband and wife in order that it may be declared community estate. In many cases it may be difficult or impossible to prove this. And indeed, in a particular case satisfactory proof might be made that the wife contributed nothing to the acquisitions; or on the other hand, that the property was wholly acquired by her industry; but from the very nature of the marriage relation, the law cannot permit inquiries into such matters. It conclusively presumes that whatever is acquired, except by gift, devise, or descent, or by exchange of one kind of property for another kind, is acquired by their mutual industry: *De Blane v. Lynch*, 23 Tex. 25; *Lake v. Lake*, 4 West Coast Rep. 159 (Nev.).

PUBLIC LANDS. — The first question that arises in determining whether a grant of public lands is or is not community property is whether or not such grants are gifts or donations, for if they be, then they become separate property. In deciding this question, reference is had to the principle that the joint acquisitions of the husband and wife are community property, and to the rule of the Spanish law that what is acquired by onerous title is community property. In Texas, colonial grants and head-right certificates are held to be issued under onerous conditions, and hence to be community property, since money must be paid and labor done to acquire them: *Yates v. Houston*, 3 Tex. 433; *Hodge v. Donald*, 55 Id. 344; *Manchaca v. Field*, 62 Id. 135. So land acquired through grant of pre-emption is classed as community property, and it can make no difference whether the grant be taken in the name of the wife or in that of the husband: *Allen v. Harper*, 19 Id. 502.

On the other hand, a Mexican land grant is held to be a gift, and consequently separate property of the donee; for, though certain conditions are attached to the grants, they are held not to be onerous, since they consist in the expenditure of money and labor upon the land itself, and for the benefit of the grantee, and not for the benefit of the grantor or parties other than the grantee, the latter conditions alone being onerous in a grant: *Noe v. Card*, 14 Cal. 578; *Fuller v. Ferguson*, 26 Id. 547; *Panaud v. Jones*, 1 Id. 514; *Scott v. Ward*, 13 Id. 459; *Wilson v. Castro*, 31 Id. 420. And whatever is expended out of the community funds in performing the conditions of a Mexican grant constitutes a charge upon the land granted, but does not change it to community property: *Noe v. Card*, *supra*; *Fuller v. Ferguson*, *supra*.

Furthermore, it frequently happens that land entered during the existence of the community is not patented or granted to the settler until after the dissolution of the community by death or otherwise. In such case, however, if, during the life of the wife, the title becomes inchoate, and the husband acquires a legal right to the title, or if the title is granted to him by virtue of his *status* as a married man at the date of his wife's death, the land is community property, and the half-interest of the wife, subject to the debts of

the community, will descend to her heirs, though the grant or patent does not issue until after her death: *Hodge v. Donald*, 55 Tex. 344; *Caruth v. Grigsby*, 57 Id. 259; *Cannon v. Murphy*, 31 Id. 405; *Wright v. McGinty*, 37 Id. 733; *Carter v. Wise*, 39 Id. 273; *Wilkinson v. Wilkinson*, 20 Id. 237; *Parker v. Chance*, 11 Id. 513; *Thomas v. Chance*, 11 Id. 637; *Burris v. Wideman*, 6 Id. 232; *Rudd v. Johnson*, 2 Tex. Law Rep. 316. On the other hand, though public land granted to the husband after the death of the wife was selected before her death, it will not be regarded as community property if there is nothing to show that anything had been done before the dissolution of the community which gave the right in law to demand the title afterwards issued to the husband: *Webb v. Webb*, 15 Tex. 274; and so land granted to the husband as a single man, after the death of his wife, independent of his *status* as a married man, will be separate property: *Hodge v. Donald*, 55 Id. 344; and see *Porter v. Burnett*, 60 Id. 220.

As the title to government land dates from the certificate, and not from the patent, if land be entered in the name of the wife during marriage, but the patent be issued after the community is dissolved by judgment, the land will be presumed to be an acquisition of the community: *Simien v. Perrodin*, 35 La. Ann. 931. So where a woman living on public land married, and the husband afterwards filed a declaratory statement upon it in his own name and made the required proof, and was allowed to enter and purchase the land in his own name, and subsequently the husband and wife sold the land, and with the proceeds purchased other land, the land so purchased was community property: *Eslinger v. Eslinger*, 47 Cal. 62. But where the wife was the holder of a pre-emption right before marriage and the patent issued after marriage, the patent related back to the date of her entry, and the land was her separate estate: *Harris v. Harris*, 12 Pac. Rep. 274.

INCREASE AND PROFITS OF SEPARATE PROPERTY. — The law of California and Nevada differs from that of Texas in this regard. The California statute of 1850 provided that the rents, issues, and profits of the separate property of either spouse shall be deemed community property. But this law was held to be in conflict with the constitution of the state and therefore void, on the ground that the term "separate property" in the constitution was used in its common-law sense, by which law "separate property" means an estate held both in its use and in its title for the exclusive benefit of the wife: *George v. Ransom*, 15 Cal. 324; *Lewis v. Johns*, 24 Id. 98; S. C., 85 Am. Dec. 49. The code now expresses the rule established by these decisions, and provides that the rents, issues, and profits of separate property shall remain separate property: Civ. Code, secs. 162, 163; *Marlow v. Barlow*, 53 Cal. 459; *Beaudry v. Filch*, 47 Id. 183. So the husband can acquire no interest in the wife's separate estate, nor in the issues or profits thereof by virtue of any supervision or labor on his part, for that is her separate property: *Lewis v. Johns*, 24 Id. 98; S. C., 85 Am. Dec. 49. In *Lewis v. Lewis*, 18 Cal. 654, the facts were as follows: A man at the time of his marriage owned certain cattle, horses, and money valued at twenty thousand dollars. He died five years later possessed of cattle, horses, and money valued at forty thousand dollars. His sole business at the time of his marriage and since that time had been dealing in cattle and horses, and at his death he had about four thousand dollars of the original stock possessed at his marriage, and the balance consisted of the increase of that stock, together with other stock bought with the proceeds of the sale of the original stock. It was held that as the deceased was engaged in no other business except dealing in stock from his marriage to his death, the fair inference was that the common property was the difference between the original

value of his property at his marriage and the value of the property possessed at the time of his death, less the community debts. This decision does not correctly enunciate the law of California. All the property possessed by the husband at the time of his death was either the increase of his separate property or property purchased with it or exchanged for it, and such property remains separate property in this state: *Smith v. Smith*, 12 Cal. 224; S. C., 73 Am. Dec. 533; *Lewis v. Johns*, 24 Cal. 98; S. C., 85 Am. Dec. 49. And the incorrectness of *Lewis v. Lewis* is especially apparent when viewed in the light of later decisions. Thus in *Estate of Higgins*, 65 Cal. 407, it was held that money accumulated by a husband during marriage by his ordinary use and management of property which he owned at the time of the marriage, and which consisted, in this case, of a farm, stock, and utensils which he used in carrying on the ordinary business of farming, was separate property, and real estate purchased with such money was separate property of the husband. And so in Nevada, where the same law prevails as in California, it has been held in a late case that though profits of separate property accruing mainly from the efforts or skill of both husband and wife belong to the community, the profits of separate property which accrue mainly from the property rather than from the joint efforts of the husband and wife, or either of them, belong to the owner of the property, although the labor and skill of one or both of the spouses may have been given to the business; and therefore the profits resulting from the ordinary use of a hotel, ranch, and toll-road which were the separate property of the husband, either from renting or from carrying on the business himself, belong to the husband as his separate estate: *Lake v. Lake*, 18 Nev. 361; S. C., 4 West Coast Rep. 159. Professor Pomeroy took issue with these decisions, and deprecated their construction of rents, issues, and profits as including the profits of a business carried on by the husband with his separate property, in which he uses his own labor and skill, and is constantly buying, selling, and exchanging: Note in 4 West Coast Rep. 193, 357, 389. But such is the construction at present obtaining in California and Nevada, and no middle course is practicable, such as determining a portion of the profits to be community property; for how can it be ascertained how much of the profits is due to the labor and skill of the husband, and how much is to be attributed to the capital invested or separate means and property employed? Either the law of these decisions must prevail, or the rule as adopted in Texas must be followed, which gives such profits to the community.

In Louisiana it is held that where after marriage and under the *régime* of the community a business which had formerly belonged to and been conducted by the wife is conducted in the name of the husband, it becomes the business of the community, and its acquets and good-will are liable to seizure for the husband's debts: 36 La. Ann. 390. By the Spanish and Mexican law and in Louisiana the increase of separate property becomes community property: *Fuller v. Ferguson*, 26 Cal. 546; *Fisher v. Gordy*, 2 La. Ann. 762; *Webb v. Post*, 7 Id. 92. Funds borrowed by the wife upon the faith of her separate property are, in California, separate property: *Schuyler v. Broughton*, 11 Pac. Rep. 719 (Cal.).

Texas. — In Texas the increase of separate property is community property, with the exception of the increase of separate lands and slaves which is separate property, or since the emancipation of slaves the increase of all separate property, with the exception of the "increase of lands" which are separate property, is community property: *Magee v. White*, 23 Tex. 191; *McIntyre v. Chappell*, 4 Id. 187; *Love v. Robertson*, 7 Id. 6; S. C., 56 Am. Dec. 41; *Cartwright v. Cartwright*, 18 Tex. 626. The constitution of 1869 changed the

law, providing that the increase of married women's separate property should be protected as separate; but in 1876 the law was restored by amendments to its original condition: *De Garca v. Galean*, 55 Id. 56.

In this state the courts have gone so far as to hold that "increase" of land will not include crops raised thereon; and that crops raised on land which is the separate property of the wife, though the expenses of raising the crops are paid out of the wife's separate money, or the labor is furnished by her slaves, is nevertheless community property: *De Blane v. Lynch*, 23 Tex. 25; *Magee v. White*, 23 Id. 191; *Forbes v. Dunham*, 24 Id. 611; *Seligsohn v. Staples*, Texas Court of Appeals, sec. 1071. In construing the meaning of this word "increase" in the constitution and statute protecting as separate property the increase of lands and slaves which may be the separate property of either spouse, the court admitted that in its etymological sense the word, as applied to land, means that which grows out of it, or which is produced by cultivation; but refused to give it this signification as used in the constitution and statute, on the ground that to adopt this meaning of it "would lead to inequitable results wholly inconsistent with the recognized principles of law upon which our system of community property is based": *De Blane v. Lynch*, 23 Tex. 25; *Forbes v. Dunham*, 24 Id. 612; *Portis v. Parker*, 22 Id. 702; *Bateman v. Bateman*, 25 Id. 270; *Carr v. Tucker*, 42 Id. 337. So lumber sawed at a mill which was the separate property of the wife, by the labor of slaves also her separate property, and out of timber procured from land which was likewise her separate property, is nevertheless the property of the community, and not the separate property of the wife: *White v. Lynch*, 26 Id. 195, citing and approving *De Blane v. Lynch*, *supra*; *Holland v. Seward*, Texas Court of Appeals, Civil Cases, sec. 944. The increase of cattle which are the separate property of the wife is community property: *Howard v. York*, 20 Tex. 670; *Bateman v. Bateman*, 25 Id. 270. So the profits of a mercantile business carried on by the husband or wife during marriage belong to the community, though the funds invested in the business are separate property: *Marx v. Lange*, 61 Id. 547; *Heidenkermer v. Felker*, Texas Court of Appeals, Civil Cases, sec. 362. While, however, the hire of the wife's separate property is community property, yet the creditor of the husband, in a suit against him by the wife for her separate property, cannot offset his debt against the use and hire of her property while in his possession: *Carr v. Tucker*, 42 Tex. 330.

Interest accruing from a loan of the wife's money is not her separate property, but being the increase thereof, falls into the community: *Braden v. Goss*, 57 Tex. 37, 41. But a creditor of the husband who by vexatious proceedings and threats prevents the payment of a note due the wife for purchase-money of land, her separate estate, so that interest accumulates thereon, which, together with the purchase-money, becomes a lien on the land, cannot subject the interest to the payment of the husband's debt: *Carlisle v. Sommer*, 61 Id. 124. And it was held that interest due on a note made to the wife by the husband was her separate property, on the ground that his contract made it so: *Hall v. Hall*, 52 Id. 294.

SEPARATE PROPERTY AS DISTINGUISHED FROM COMMUNITY PROPERTY. -- No property acquired by either spouse during coverture becomes separate estate, except such as is derived by gift, bequest, devise, or descent, and all acquired in any other manner is community: *Exell v. Dodson*, 60 Tex. 331. This, however, is to be taken with the limitation that property purchased with or exchanged for separate property, though during the existence of the marital relation, is separate property. For separate property remains such as long as it can be traced: *Hall v. Hall*, 52 Id. 298; *Cox v. Miller*, 54 Id.

16; *Love v. Robertson*, 7 Tex. 6; S. O., 56 Am. Dec. 41; though where it has undergone mutations, it is indispensable to maintain its separate character that it be clearly and indisputably traced and identified: *Chapman v. Allen*, 15 Tex. 278; *Rose v. Houston*, 11 Id. 324. Yet if it can be established that property purchased during marriage was purchased with separate funds, it remains separate property: *Moore v. Jones*, 63 Cal. 12; *Ramadeil v. Fuller*, 28 Id. 42; *Dominguez v. Lee*, 17 La. 295. And there is no legal presumption that land which is the separate property of the husband, and which he conveys to his wife in consideration of money which is her separate property, becomes community property, but it will be the separate property of the wife: *Hussey v. Castle*, 41 Cal. 241. But in Louisiana it is held that property purchased by a husband in his own name with the funds of the wife belong to the community: *Comeau v. Fontenot*, 19 La. 406; for the Spanish law makes property purchased with separate property common property: See *Davenat v. Le Bocton*, 1 Id. 520; and see *supra*, "Spanish law." And in Texas, where, as we have seen, the increase of separate property is community property, merchandise purchased by the wife with money borrowed on the security of her separate property is community property: *Heidenheimer v. McKeen*, 63 Tex. 229. Where a portion of the purchase-money is separate property, the spouse to whom the separate purchase-money belongs takes as separate property a proportionate undivided interest in the property purchased: *Clairborne v. Tanner*, 18 Id. 69; *Braden v. Gose*, 57 Id. 37; *Parker v. Coop*, 60 Id. 112; *Schuyler v. Broughton*, 11 Pac. Rep. 719 (Cal.). Land purchased with community funds is of course community property: *Schuyler v. Broughton*, *supra*.

Under the Spanish law, labor or expenditure incurred by the community for the preservation or improvement of separate property did not change the character of the separate property, but simply created a charge upon it in favor of the community: *Noe v. Card*, 14 Cal. 578; *Fuller v. Ferguson*, 26 Id. 547. Improvements made upon separate property, unless made with separate means, will generally become common property: *Rice v. Rice*, 21 Tex. 67; *Dominguez v. Lee*, 17 La. 295. Except that when the community funds are expended in erecting such a structure as a house on community property, which becomes a fixture, the title to the house will be solely in the spouse owning the separate property, and neither the other spouse, nor his or her creditors, have any lien on the house or lot for the money expended: *Peck v. Brummagin*, 31 Cal. 440; but it is said that the community estate must be reimbursed for the cost of such improvements: *Rice v. Rice*, 21 Tex. 67. In Louisiana, it is held that a spouse whose separate funds have been invested for the benefit of the community becomes a creditor of the community to that extent. The husband so becoming a creditor is postponed to the other creditors of the community; but as against the wife and her heirs his claim is perfect; and he may have the property sold to ascertain what, if any, remains in common: *Merrick's Succession*, 35 La. Ann. 296; *Moore v. Stancet*, 36 Id. 819.

WIFE'S EARNINGS. — The profits and labor of the husband and wife belong to the community, and therefore the wife's earnings, as well as those of the husband, must be regarded as community property: *Pearce v. Jackson*, 61 Tex. 642; *Prendergust v. Cassidy*, 8 La. Ann. 96; *Ford v. Brooks*, 35 Id. 157; *Fuller v. Ferguson*, 26 Cal. 547 (Mexican law). So property bought by the wife with her own earnings is community property, unless it be shown that it was the intent of the husband to give her the proceeds of her earnings; and in that case the property will be regarded as the wife's separate property: *Johnson v. Burford*, 39 Tex. 242. By the Spanish and Mexican law, the wife's earnings

were regarded as community property: *Fuller v. Ferguson*, 28 Cal. 567. And the whole theory of community property establishes indisputably that such must be the case, since the property of the community embraces all acquisitions by either spouse during marriage, whether made jointly or separately: *Meyer v. Kimer*, 12 Cal. 252; S. C., 73 Am. Dec. 538. And furthermore, the statute provides that all property shall be community, except such property as is owned before marriage and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, or profits thereof; and under none of the designations of separate property herein contained can the earnings of the wife fall. The community system also regards the members of the marital community as equal in their property rights, except that the husband has the management and control of the community funds during the existence of the community. It would not for a moment be claimed that the husband's earnings are not community property; and considering the equality of the spouses before the law in relation to their property rights, with what shadow of logic can it be contended that the wife's earnings are not community property? It is true that the law of California provides that the earnings of the wife shall not be liable for the debts of the husband, and when living apart from her husband they shall be her separate property: Civ. Code, secs. 168, 169; *Finnigan v. Hibernia S. & L. Soc.*, 63 Cal. 390. But in consideration of the foregoing, these statutory provisions applicable to special enumerated conditions and circumstances cannot justify the remarks of the court in *Marlow v. Barlow*, 53 Cal. 459, to the effect that the wife's earnings while living with her husband are her separate property: See also Platt on Property Rights of Married Women, sec. 42. The law of Nevada is the same as that of California: Comp. Laws, 163, 164. But the statutes of that state contain the conditional provision that "when the husband has allowed the wife to appropriate to her own use her earnings, the same, with the issues and profits thereof, is deemed a gift from him to her, and is, with such issues and profits, her separate property": Comp. Laws, 165. The addition of this provision certainly warrants the conclusion that the legislators of Nevada considered that in its absence, notwithstanding the provision for exemption of the wife's earnings from liability for her husband's debts, the wife's earnings while living with her husband would necessarily be community property.

MISCELLANEOUS INSTANCES ILLUSTRATIVE OF COMMUNITY PROPERTY.—Where personal property is conveyed to a husband and wife as trustees, subject to be used for the support of the trustees and their children, the accumulated profits arising from the property, after supplying the uses charged upon it, become the property of the trustees, and this property is community property: *Fitzpatrick v. Pope*, 39 Tex. 315. So damages recovered for injuries done to the wife (in this case amounting to a thousand dollars) must be regarded as community property: *T. C. R'y Co. v. Burnett*, 61 Id. 638. Land purchased and paid for by the husband, after the death of the wife, with money belonging to the community estate, is community property, and is held by the surviving husband as tenant in common with the children of his deceased wife. And this follows from the common doctrine of trusts, that where one purchases with funds belonging to another, and takes the title to himself, he holds it in trust for him who furnished the money; and where but a part of the money is furnished the equity attaches *pro tanto*: *McAlister v. Farley*, 39 Id. 552. In *Pancoast v. Pancoast*, 57 Cal. 320, the husband before his marriage was in the possession without right of a tract of land, and after his marriage he made a deed and gave up possession of a portion thereof to the rightful owners, and induced thereby the owners conveyed the fee of a por-

tion of the land to him; and it was held that the land thus acquired became community property. Where one purchases land, and his wife dies soon after, and he marries in the next year, the payment of a portion of the purchase-money soon after the second marriage will raise no presumption that the money used was the community fund of the husband and of his second wife: *Medlenka v. Downing*, 59 Tex. 32. But the community does not embrace property received by either spouse in payment of money due in his or her separate right: *McIntyre v. Chappell*, 4 Id. 187; *Davenat v. Le Bocton*, 1 La. 520.

PRESUMPTION OF COMMUNITY PROPERTY. — All property acquired by either spouse during the existence of the community is presumed to belong to it and to be community property, and though this presumption is not conclusive, but may be rebutted, the burden of proof lies on the person claiming it to be separate property to prove it to be such by clear and satisfactory evidence: *Smith v. Smith*, 12 Cal. 216; S. O., 73 Am. Dec. 533; *Scott v. Ward*, 13 Cal. 471; *Tryon v. Sutton*, 13 Id. 493; *Burton v. Lies*, 21 Id. 87; *Althof v. Conheim*, 38 Id. 233; *Smalley v. Lawrence*, 9 Rob. (La.) 210; *Ford v. Ford*, 1 La. 201, 207; *Labbe's Heirs v. Abat*, 2 Id. 553; S. O., 22 Am. Dec. 151; *Bryan v. Moore*, 11 Mart. (La.) 26; S. O., 13 Am. Dec. 347; *Webb v. Peet*, 7 La. Ann. 92; *Bachino v. Coste*, 35 Id. 570; *Moore v. Stancet*, 36 Id. 819; *Lake v. Lake*, 4 West Coast Rep. 159 (Nev.); *Wood v. Wheeler*, 7 Tex. 20; *Chapman v. Allen*, 15 Id. 278; *Johnson v. Burford*, 39 Id. 242, 249; *Cox v. Miller*, 54 Id. 16; *Connor v. Hawkins*, 2 S. W. Rep. 520 (Tex.). And such was the Spanish law: *Scott v. Ward*, 13 Cal. 471; *Yates v. Houston*, 3 Tex. 452; *Scott v. Maynard*, Dallam, 548.

Likewise, the presumption attending possession of property by either spouse is, that it belongs to the community; and this presumption can be overcome only by clear and certain proof that it was owned by the claimant before marriage or acquired afterwards by gift, bequest, devise, or descent, or that it is property taken in exchange for or in the investment of or as the price of the property so originally owned or acquired. And the burden of proof rests with the claimant of the separate estate: *Meyer v. Kinzer*, 12 Cal. 247; S. O., 73 Am. Dec. 538; *Shuler v. Savings and Loan Society*, 1 West Coast Rep. 125 (Cal.); *Scott v. Ward*, 13 Cal. 471; *Lott v. Keach*, 5 Tex. 394; *Cox v. Miller*, 54 Id. 25. And this was so under the Spanish law: *Scott v. Ward*, 13 Cal. 471. Where the matrimonial union has continued for any considerable period, the presumption is strong that the property belongs to the common stock of acquests and gains. It does not, however, become conclusive, but is disputable: *Edrington v. Mayfield*, 5 Tex. 368. There is no presumption that property in the possession of a conjugal partnership belongs rather to the husband than to the wife: *Edrington v. Mayfield*, *supra*.

PRESUMPTION IN CASE OF REAL PROPERTY ACQUIRED DURING MARRIAGE. — No doctrine is better settled than that realty acquired during coverture by purchase or apparent onerous title, whether the conveyance be taken in the name of the husband or of the wife, or in the joint names of both, will be presumed to be community property. The fact that the acquisition is made by purchase precludes the supposition of a gift, bequest, devise, or descent, and the only way in which the presumption may be prevented from becoming conclusive is by means of clear and satisfactory proof that the purchase was made with the separate funds of one of the spouses, in which event the property will be the separate estate of the spouse advancing the purchase-money: The principal case; *Wallace & Co. v. Campbell*, 54 Tex. 89; *Mitchell v. Marr*, 26 Id. 329; *Scott v. Maynard*, Dallam, 551; *Collins v. Turner*, Tex. Court

of Appeals, Civil Cases, sec. 517; *Huston v. Curl*, 8 Tex. 239; S. C., 58 Am. Dec. 110; *Allen v. Harper*, 19 Tex. 502; *Johnson v. Burford*, 39 Id. 242, 249; *Vera-mendi v. Hutchins*, 48 Id. 551; *Cox v. Miller*, 54 Id. 16; *Brouder v. Clemens*, 61 Id. 587; *Johnson v. Johnson*, 11 Cal. 205; *Meyer v. Kinzer*, 12 Id. 247; S. C., 73 Am. Dec. 538; *Peck v. Vandenberg*, 30 Cal. 52; *Schuyler v. Broughton*, 11 Pac. Rep. 719 (Cal.); *Provost v. Delahouseaye*, 5 La. Ann. 610; *Webb v. Peet*, 7 Id. 92; *Forbes v. Forbes*, 11 Id. 326. The presumption that a deed to the husband is a conveyance to the community is, under ordinary circumstances, much stronger than when the deed is to the wife: *Higgins v. Johnson*, 20 Tex. 393; S. C., 70 Am. Dec. 394; see also *Peck v. Vandenberg*, 30 Cal. 52; *Shuler v. Savings and Loan Society*, 1 West Coast Rep. 125 (Cal.). But nevertheless, a deed of bargain and sale to the wife during coverture imports that the property conveyed is community property, and it rests with her to show by clear and satisfactory proof that her separate funds were employed in its purchase, or that the deed was in fact a deed of gift, no valuable consideration being paid: *Alverson v. Jones*, 10 Cal. 12; *Mott v. Smith*, 16 Id. 533, 557; *Kohner v. Ashenauer*, 17 Id. 581; *Adams v. Knowlton*, 22 Id. 283; *Riley v. Pehl*, 23 Id. 70; *Tusten v. Faught*, 23 Id. 237; *McDonald v. Badger*, 23 Id. 393; S. C., 83 Am. Dec. 123; *Landers v. Bolton*, 26 Cal. 393; *Ramsdell v. Fuller*, 28 Id. 42, 43; *Althof v. Conheim*, 38 Id. 233; *Higgins v. Higgins*, 46 Id. 259; *Wedel v. Herman*, 59 Id. 516; *Moore v. Jones*, 63 Id. 12; *Schuyler v. Broughton*, 11 Pac. Rep. 719 (Cal.); *Davidson v. Stuart*, 10 La. 146; *Collins v. Turner*, Tex. Court of Appeals, Civil Cases, sec. 517; *Parker v. Chance*, 11 Tex. 513; *Higgins v. Johnson*, 20 Id. 389; S. C., 70 Am. Dec. 394; *Castro v. Illies*, 22 Tex. 479; S. C., 73 Am. Dec. 277; *Johnson v. Burford*, 39 Tex. 242; *Stanley v. Epperson*, 45 Id. 645; *Zorn v. Tarver*, 45 Id. 520. A wife cannot acquire property by purchase during coverture, except in exchange for her separate property, unless she is made a sole trader: *Alverson v. Jones*, 10 Cal. 9. If the consideration of a deed to the wife is shown to be in part money and in part love and affection, the land will be regarded as common property to the extent of the money consideration, in the absence of evidence that this was separate property: *Zorn v. Tarver*, 45 Tex. 520. But a deed to the wife that recites a consideration of money paid, as well as love and affection, is presumed to convey community property: *Tusten v. Faught*, 23 Cal. 237. Where, however, the consideration is in part community funds and in part the separate funds of the wife, she becomes a tenant in common of the land with her husband, her interest being proportionate to her investment: *Schuyler v. Broughton*, 11 Pac. Rep. 719 (Cal.).

The fact that a deed of purchase received during coverture is taken in the name of the wife raises no presumption in her favor to the effect that the property became her separate property, and in the absence of evidence that the property was purchased with the separate funds of the wife, the presumption that it is community property is absolute and conclusive: *Pizley v. Higgins*, 15 Cal. 127; *Smalley v. Lawrence*, 9 Rob. (La.) 210; *Tucker v. Carr*, 39 Tex. 98; *Wallace & Co. v. Campbell*, 54 Id. 89. Such a deed excludes all presumption that the property was acquired by "gift, bequest, devise, or descent": *McDonald v. Badger*, 23 Cal. 393; S. C., 83 Am. Dec. 123; *Meyer v. Kinzer*, 12 Cal. 247; S. C., 73 Am. Dec. 538.

PRESUMPTION OF COMMUNITY PROPERTY, HOW AND WHEN MAY BE REBUTTED. — We have seen that the presumption that property acquired during coverture is community is not generally a conclusive presumption, but may ordinarily be rebutted by clear, satisfactory, and convincing proof that the purchase-money or consideration was separate property, or that the transfer was in fact a gift. And also that the burden of proof is upon the party who

claims that the property so acquired is not community property: See *Meyer v. Kinser*, 12 Cal. 247; S. C., 73 Am. Dec. 538; *Smith v. Smith*, 12 Cal. 216; S. C., 73 Am. Dec. 533; *Mott v. Smith*, 16 Cal. 533, 557; *Adams v. Knowlton*, 22 Id. 283; *McDonald v. Badger*, 23 Id. 393; S. C., 83 Am. Dec. 123; *Higgins v. Higgins*, 46 Cal. 259; *Moore v. Jones*, 63 Id. 12; *Ford v. Ford*, 1 La. 201, 207; *Fisher v. Gorde*, 2 La. Ann. 762; *Webb v. Peet*, 7 Id. 92; *Bachino v. Coste*, 35 Id. 570; *Lake v. Lake*, 4 West Coast Rep. 159 (Nev.); *Scott v. Maynard*, Dallam, 551; *Lott v. Keach*, 5 Tex. 394; *Love v. Robertson*, 7 Id. 6; S. C., 56 Am. Dec. 41; *Huston v. Curl*, 8 Tex. 239; S. C., 58 Am. Dec. 110; *Dunham v. Chatham*, 21 Tex. 244; *Castro v. Illica*, 22 Id. 479; S. C., 73 Am. Dec. 277; *Coats v. Elliott*, 23 Tex. 613; *Cox v. Miller*, 54 Id. 25; *Duke v. Reed*, 64 Id. 705. Thus in *Ramedell v. Fuller*, 23 Cal. 42, 43, Sawyer, J., says: "But this is only a presumption of law arising from the fact that a purchase has been made during coverture, and the real character of the transaction may be shown. It is much easier for the party purchasing the land to show affirmatively that the funds used were separate property of the party purchasing than for others interested to show negatively that they were not. The evidence is peculiarly within the knowledge and control of such party. For these and other reasons, when the fact is required to be proved, the law throws the burden of identifying the funds as a part of the separate estate upon the party claiming the benefit of such estate." But the burden of proof is always upon the party claiming such an acquisition to be separate, though such party be neither the husband nor the wife. Thus in *Mott v. Smith*, 16 Cal. 533, 557, the *onus* of establishing this was held to be on a defendant in a suit in ejectment brought by the husband and wife, the defendant having moved for a nonsuit on the ground that the evidence had not established any joint seisin in the plaintiffs, to one of whom only the land had been conveyed during coverture.

The claim of separate property should be supported by abundant proof: *Gilliard v. Chesney*, 13 Tex. 337; *Smith v. Smith*, 12 Cal. 216; S. C., 73 Am. Dec. 533; *Love v. Robertson*, 7 Tex. 6; S. C., 56 Am. Dec. 41. Though the presumption that property purchased by the husband is community property is stronger than when the purchase is made by the wife, *Higgins v. Johnson*, 20 Tex. 393, S. C., 70 Am. Dec. 394, still even this presumption may be repelled by evidence sufficiently convincing: *Duke v. Reed*, 64 Tex. 705.

AGAINST WHOM PRESUMPTION THAT PROPERTY IS COMMUNITY MAY BE REBUTTED — BONA FIDE PURCHASERS FROM HUSBAND. — Here again the courts in California and Texas hold differently. In Texas, one who purchases from the husband land acquired during marriage, the deed to which is made to the wife, is not thereby put upon inquiry as to any equity she may have in respect to it, but is protected if he buys in ignorance of her claim to it as separate property, though the rule would be otherwise if the recitals in the deed show that the consideration paid was the wife's separate estate, or that the purchase was designed for her separate use and benefit: *Kirk v. Navigation Co.*, 49 Tex. 215; *French v. Strumberg*, 52 Id. 109; *Smith v. Boquet*, 27 Id. 507; *Wallace & Co. v. Campbell*, 54 Id. 89; the principal case; *McDaniel v. Weiss*, 53 Id. 263; *Zorn v. Tarver*, 57 Id. 390; *Parker v. Coop*, 60 Id. 111; *Pearce v. Jackson*, 61 Id. 642. The inspection of a deed to the wife reciting a valuable consideration authorizes the inference that it is community property, and that the husband consequently has the power to dispose of it, and there is no obligation on the part of the purchaser from the husband, under such circumstances, to inquire into any equities that the wife may have. And the same principle applies where the husband sells such property after the death of the

wife: *French v. Strumberg*, 52 Tex. 109, 110. And a judgment creditor who purchases at his own sale is to be regarded as a *bona fide* purchaser, and protected in this manner against proof that the consideration of the deed was the separate property of the wife: *Wallace & Co. v. Campbell*, 54 Id. 87; *Parker v. Coop*, 60 Id. 111.

But an attaching creditor, or one who has acquired an apparent lien upon property which has been purchased in whole or in part with the separate means of the wife, does not occupy such a position as precludes the wife from proving her separate interest: *Parker v. Coop*, 60 Tex. 111; for such protection is accorded under like circumstances to a third party, and there is nothing in the marital relation that should prevent it from being extended to the wife: Id.

And against purchasers with notice: *Zorn v. Tarver*, 57 Tex. 390; *Braden v. Goss*, 57 Id. 37; *John v. Battle*, 58 Id. 591; and as between husband and wife, and their heirs and privies, and third persons, — the presumption of community property is always rebuttable: The principal case, *Smith v. Boquet*, 27 Id. 507; *French v. Strumberg*, 52 Id. 109.

In California, however, the rule is that parties purchasing from the husband land deeded to the wife for a money consideration during coverture do so at their peril. The record of the deed to the wife is notice to all the world that the land may be the separate property of the wife, and is sufficient to put purchasers upon inquiry: *Ramadell v. Fuller*, 28 Cal. 37. And the same rule applies to a purchaser from the husband after the death of the wife. The burden of proof is, however, upon those claiming it to be separate property of the wife: *Moore v. Jones*, 63 Id. 12. And a purchaser at a sheriff's sale of the property as belonging to the community will take a *prima facie* title: *Alverson v. Jones*, 10 Id. 12.

RECITAL IN DEED OF NATURE OF CONSIDERATION OR PURPOSE OF CONVEYANCE. — Property conveyed to the wife during coverture, and limited by the terms of the deed to her sole and separate use, becomes, in Texas, the separate property of the wife, and this whether the consideration was separate or community funds. In such case, the intention to make such property the separate property of the wife is apparent on the face of the deed, charging all who have knowledge of its existence with notice: *Morrison v. Clark*, 55 Tex. 437. But in California it has been said that a conveyance to the wife reciting a valuable consideration, and also that it was made "for her separate estate," can at most create merely a *prima facie* separate estate in her, and does not preclude a showing that the purchase was made with community funds and is community property: *McComb v. Spangler*, 12 Pac. Rep. 347. Certainly, where the instrument of conveyance recites the nature of the consideration as separate property or love and affection, this will put all parties on notice, even *bona fide* purchasers for value: See *supra*. In Louisiana the law is different, and recitals in deeds there have no effect upon the presumption of community property: See *Forbes v. Forbes*, 11 La. Ann. 326; *Bachino v. Coste*, 35 Id. 570. A deed reciting a consideration of money paid, as well as love and affection, will nevertheless be presumed to be a deed of community property: *Tusten v. Faught*, 23 Cal. 237.

PAROL EVIDENCE IS ADMISSIBLE IN REBUTTING PRESUMPTION. It is held to be no contradiction or variance of a deed to introduce parol evidence to show that the real consideration of the deed was separate property: *Peck v. Vandenberg*, 30 Cal. 42; *Peck v. Brummagim*, 31 Id. 440. So parol evidence may be introduced to show that a deed from a mother to her married daughter, which expresses upon its face a consideration of love and affection as well as

a valuable consideration in money, was given without any money consideration having passed, for the purpose of proving the deed to have been a deed of gift, and that the land conveyed became the separate property of the daughter: *Peck v. Vandenberg, supra*. So land conveyed by a bargain and sale deed to a married woman is *prima facie* common property, but she may show by extrinsic evidence that it was intended as a gift, and is separate property. Such evidence does not contradict or vary the deed: *Higgins v. Higgins*, 46 Cal. 259. So parol evidence is admissible to show that the real consideration of a deed was other property given in exchange instead of the money stated therein: *Lake v. Lake*, 4 West Coast Rep. 159 (Nev.). And parol evidence is admissible to show that a gift, though joint to the husband and wife on the face of the deed, was intended and should operate only as a gift to the wife: *Dunham v. Chatham*, 21 Tex. 244.

INTENTION OF HUSBAND THAT PROPERTY CONVEYED TO WIFE SHOULD BE HER SEPARATE PROPERTY. — The presumption that land is community property, though standing in wife's name, may be overcome by proof that the husband, in having the property put in her name, intended to donate it to her: *Higgins v. Johnson's Heirs*, 20 Tex. 389; S. C., 70 Am. Dec. 394; *Hall v. Hall*, 52 Tex. 299; *Dunham v. Chatham*, 21 Id. 244; *Johnson v. Burford*, 39 Id. 242; *Peters v. Clements*, 46 Id. 125; *Baker v. Baker*, 55 Id. 578. But see *Smith v. Strahan*, 16 Id. 314. If the husband purchase land and pay for it out of the community property, and direct the conveyance to be made to the wife as a gift, it vests the title in her: *Peck v. Brummagin*, 31 Cal. 440; *Higgins v. Higgins*, 46 Id. 259. So a conveyance made to the wife in consideration of a debt due to the community from the grantor, with the consent of the husband, and with the intent of the husband that the property conveyed should become the wife's separate property, will operate as a gift to her: *Read v. Rahn*, 65 Id. 343. In Texas, however, the husband's intention will affect the presumption only as against those who cannot claim as innocent purchasers: *Baker v. Baker*, 55 Tex. 578; *Peters v. Clements*, 46 Id. 125; *Smith v. Strahan*, 16 Id. 314; *Smith v. Boquet*, 27 Id. 507. As against such persons a deed to the wife may be shown to vest title in her separately, and parol evidence of an agreement between her and her husband, that real estate conveyed to her during coverture should be her separate property, is admissible: *T. & P. R. Co. v. Darrett*, 57 Id. 53. So where the conveyance is to the wife, and it is proved that the husband knew of it and acquiesced in it, the title inures to her benefit as completely as if he had assented by the most solemn deed. He is estopped from denying her title: *Hatchett v. Conner*, 30 Id. 104. The declaration of the husband at the time that his intention in taking the deed in his wife's name was to make the land her separate property is admissible: *Johnson v. Burford*, 39 Id. 242.

WHERE PURCHASE-MONEY IS SEPARATE PROPERTY OF HUSBAND, AND DEED IS TO WIFE. — Where the purchase-money of land the deed of which is taken in the wife's name is shown to be the separate property of the husband, the presumption is that he intended to make a gift of the property to his wife, and the deed will be regarded as *prima facie* vesting in her the whole interest, as well legal as beneficial: *Smith v. Strahan*, 16 Tex. 314; *Tucker v. Carr*, 39 Id. 98; *Dunham v. Chatham*, 21 Id. 244; see also *Peters v. Clements*, 46 Id. 125. This presumption may be rebutted, however, by proof that he intended the purchase for his own benefit: *Higgins v. Johnson*, 20 Id. 389; S. C., 70 Am. Dec. 394.

The intention of the parties at the time of the execution of the deed to the wife, where the purchase-money was the separate property of the hus-

band, is to determine the character of the property, and whether it is to be regarded as a gift, and the separate property of the wife, or as held by her in trust for her husband; and the antecedent or concomitant acts and declarations of the husband are to be regarded as parts of the transaction, and as evidence of his intention whether the purchase should be for the benefit of his wife or of himself. Subsequent acts and declarations by the husband are, however, as ineffectual against the wife as they are against a child in the case of an advancement: *Smith v. Strahan*, 16 Tex. 314; *De Garca v. Galian*, 55 Id. 53.

DECLARATIONS OF HUSBAND AS EVIDENCE. — The effect of a deed to the wife, as between her husband and parties with notice, depends upon the intention of him or them who at the date of its execution had the right to control it. In arriving at that intention, all contemporaneous circumstances and declarations are evidence of the most satisfactory character: *Baker v. Baker*, 55 Tex. 577. But the declarations of the husband are the weakest and most unsatisfactory kind of evidence: *Coats v. Elliott*, 23 Id. 613. And his declarations made after the execution of a conveyance by him to his wife are not admissible to impeach it: *De Garca v. Galian*, 55 Id. 53; *Smith v. Strahan*, 16 Id. 314; *Moore v. Jones*, 63 Cal. 12. Of course, the husband's declarations are admissible to prove that the purchase-money of property conveyed to the wife was her separate property: *Moore v. Jones*, 63 Id. 12; and to prove his intention in having a deed of land, purchased with community property, executed to his wife: *Johnson v. Burford*, 39 Tex. 242. But a mere direction by a husband to make out a deed in the name of his wife will not alone rebut the presumption of community property: *Parker v. Chance*, 11 Id. 513. And where it is attempted to establish a gift from the husband to the wife by evidence of the husband's declarations alone, the courts should exercise great caution in not excluding from the consideration of the jury any admissible evidence which would tend, though in ever so slight a degree, to counteract the evidence of the husband's declarations. And it was competent to introduce as rebutting testimony the will of the deceased husband, made subsequently to the alleged gift, containing a bequest of the same property to the wife for life, for this bequest was an act of ownership, and might be considered as a declaration that it was the property of the testator which he had the right to dispose of at his pleasure: *Barnes v. Graves*, 25 Tex. 324; see *Smalley v. Lawrence*, 9 Rob. (La.) 211.

PROOF REBUTTING PRESUMPTION MUST BE SATISFACTORY: See cases cited *supra*, "Presumption of Community, how and when may be Rebutted"; *Gilliard v. Chesney*, 13 Tex. 337. The proof introduced in rebuttal of the presumption that land conveyed to the wife during coverture is community property must be clear and indisputable. The funds invested must be traced back to the separate estate, not through indefinite and unknown channels, but connectedly and plainly: *Schmelts v. Garey*, 49 Id. 61. The fact that at the marriage the husband had much money and the wife nothing, and that during the marriage relation the parties decreased in fortune, making nothing, is not sufficient to rebut the statutory presumption that property purchased during the marriage is community property: Id. So the mere deposit of money by the husband to the account and credit of his wife cannot, of itself, be deemed a circumstance sufficiently explicit as to determine conclusively that such act was intended as a gift of the money as her separate property, and that it would have the effect, as to third persons, to alter its character as community into that of separate property: *Wellborn v. Odd Fellows B. & E. Co.*, 56 Id. 504. So an agreement between husband and

wife cannot change the character and nature of their rights and interests in property owned and acquired by them so as to relieve it from liability for debts of the community; and therefore a post-nuptial agreement that the wife shall be jointly interested with the husband in a mercantile business, and that one half of the profits thereof shall be her separate property, will not change their property rights to that of partners, or convert the community property into the separate property of the wife so as to relieve it or any part of it from liability for the husband's debts: *Cox v. Miller*, 54 Tex. 16. So, also, the presumption that a building is but a form in which the common property is invested is too cogent to be overcome by loose and unsatisfactory evidence, where it was erected during the existence of the community: *Smith v. Smith*, 12 Cal. 216; S. C., 73 Am. Dec. 533.

CONVEYANCE FROM HUSBAND TO WIFE. — A husband may give or grant the community property or his separate estate to his wife directly without the intervention of trustees: *Fitts v. Fitts*, 14 Tex. 444; *Story v. Marshall*, 24 Id. 307; *Hall v. Hall*, 52 Id. 299; *Klumpke v. Baker*, 10 Pac. Rep. 197 (Cal.). If free from debts and liabilities, he may give the community property or his separate property directly to her, and the property donated to her will become her separate property: *Kohner v. Ashenauer*, 17 Cal. 581; *Barker v. Koneman*, 13 Id. 10; *Peck v. Brummagin*, 31 Id. 440; *Wedel v. Herman*, 59 Id. 516. And there is no legal presumption that when the husband conveys his separate property to his wife in consideration of her separate funds the property becomes community property, but it becomes the separate property of the wife: *Hussey v. Castle*, 41 Id. 241. Where the husband conveys community property to the wife, in the absence of any evidence of intention outside of the deed, it must be taken as evidencing the intention which upon its face it imports; that is, to convey to the wife the estate of the husband in the property. There can be, in this case, no presumption, as in the case of a purchase from a stranger in the name of the wife, that funds of the community were employed in making the purchase, and therefore it is community property. But the conveyance being of community property of the parties between whom the conveyance is made, the presumption must be that it was intended to change its character from community to the separate property of the wife: *Story v. Marshall*, 24 Tex. 307, 308; but see *Kohner v. Ashenauer*, 17 Cal. 581. Still, where a husband intends to relinquish his right in the community property and transfer it to his wife, his act must be explicit and such as to leave no doubt of his intentions. A mere transfer of the property to a stranger, with directions to reconvey to the wife, will not accomplish the object and show that a donation was intended; and especially where the stranger is bound under penalty to make title: *Parker v. Chance*, 11 Tex. 513; *Thomas v. Chance*, 11 Id. 637. A deed of "grant" from the husband to the wife will convey the fee-simple to her, and title afterward acquired by him will not become community property, but will inure to her separate benefit: *Klumpke v. Baker*, 10 Pac. Rep. 197.

The husband may *bona fide* reimburse the wife from the community property or from his separate property, for advances received from her, in preference to his other creditors: *Cox v. Miller*, 54 Tex. 16. A gift from husband to wife will not prevail against a prior unrecorded deed: *Pearce v. Jackson*, 61 Id. 642; but it will be valid against a subsequent deed from the husband to a third person: *Story v. Marshall*, 24 Id. 305. The declarations of the husband made after his conveyance to the wife are not admissible to impeach it: *De Garca v. Galean*, 55 Id. 53. Under the Mexican law, a donation of the common or separate property by the husband to the wife, or by the wife to

the husband, was valid if not revoked, but was always revocable during the life of the donor: *Fuller v. Ferguson*, 26 Cal. 546; *Labbe's Heirs v. Abat*, 2 La. 567; 8. C., 22 Am. Dec. 151.

THE PRINCIPAL CASE IS CITED to the point that the interest of the husband and wife respectively in the community property is equal, and it is immaterial whether the grant or deed thereto conveying an apparent onerous title be in the name of the husband or wife separately or in their names jointly: *Veramendi v. Hutchins*, 48 Tex. 551; and as to *bona fide* purchasers for a valuable consideration from the husband, the presumption that such property is community property cannot be rebutted by parol evidence that it is the separate property of the wife: *Wallace & Co. v. Campbell*, 54 Id. 89; *McDaniel v. Weiss*, 53 Id. 263. A purchaser from the husband of land conveyed by such deed to the wife during marriage is not put upon inquiry as to any equity she may have in respect to it, but is protected if he buys in ignorance of her claim to it as separate property; but the rule would be different if the recitals in the deed show that the consideration paid was the wife's separate estate, or that the purchase was designed for her separate use and benefit: *Kirk v. Navigation Co.*, 49 Id. 215; see *French v. Strumberg*, 52 Id. 109; *Wallace & Co. v. Campbell*, 54 Id. 89.

WITHERS v. PATTERSON.

[27 TEXAS, 491.]

JURISDICTION OF COURT MEANS POWER OR AUTHORITY WHICH IS CONFERRED UPON IT by the constitution and laws to hear and determine causes between parties and to carry its judgments into effect.

POWERS OF COUNTY COURTS IN RESPECT TO ESTATES OF DECEDENTS are all conferred by statute, and whatever the statute authorizes these courts to do they may rightfully do.

ORDER OF SALE OF LAND OF DECEDENT MADE WHEN CIRCUMSTANCES DO NOT EXIST, which under the law authorize the court to make the order, is without jurisdiction or authority.

COURT OF GENERAL JURISDICTION IS PRESUMED IN ABSENCE OF PROOF TO HAVE ACTED within limits of its authority in doing a thing which it has the power under certain circumstances to do, such circumstances being presumed to have existed; but this presumption is indulged only in the absence of proof, and not against proof.

PURCHASER AT ADMINISTRATOR'S SALE IS SOMETIMES SAID NOT TO BE BOUND to look beyond the judgment of a court of competent jurisdiction, and it is often said that an order of sale and a sale under the order are effectual to pass the title to the purchaser; but it is always understood that the jurisdiction of the court has been rightfully called into exercise, and that the order of sale is a valid order.

COURT EXERCISES ITS JURISDICTION ONLY WHEN FACTS EXIST which authorize it to act, and it is not universally true that if a court determines any question of fact necessary to support its jurisdiction its determination or judgment can never be collaterally impeached.

ORDERS OR JUDGMENTS OF PROBATE COURT, MADE OR RENDERED IN PROGRESS OF RIGHTFUL ADMINISTRATION, concerning matters upon which the court has the right to deliberate and decide, cannot be collaterally impeached, because, however erroneous they may be, they are not void.

ORDERS OR JUDGMENTS WHICH COURT HAS NO POWER UNDER ANY CIRCUMSTANCES TO MAKE OR RENDER are, of course, null, and their nullity may be asserted in any collateral proceeding where they are relied on in support of a claim of right.

BONA FIDE PURCHASER AT ADMINISTRATOR'S SALE, MADE IN PURSUANCE OF ORDER which the court had the power to make, takes a good title, which cannot be impeached collaterally, and is not affected by any irregularities in the proceedings of the court.

WHERE GRANT OF ADMINISTRATION IS VOID, ORDER OF SALE IS VOID, and a purchaser thereunder acquires no title, all proceedings in the course of such administration being void and collaterally attackable.

ORDER OF SALE IN COURSE OF RIGHTFUL ADMINISTRATION IS VOID and collaterally attackable where the record shows that the facts empowering the court to order a sale did not exist; but if the record is silent such facts will be presumed to have existed.

POWER OF COURT TO GRANT LETTERS OF ADMINISTRATION depends upon the facts as they exist at the time the letters are granted; and if the court had not this power, none of the proceedings in the course of such administration can have any validity in favor of any person on the ground that he was ignorant of the want of power in the court to grant the letters of administration.

RECORDS OF PROBATE COURT SHOW THAT ESTATE HAS BEEN FULLY ADMINISTERED for all purposes except partition and distribution, notwithstanding the final account of the administrator shows a trifling balance due him from the estate; for his discharge without asking payment raises the presumption that he remitted the debt to the estate, and the rule *de minimis non curat lex* applies.

WHERE RECORD OF PROBATE COURT SHOWS THAT ESTATE HAS BEEN FULLY ADMINISTERED, except for purposes of partition and distribution, and a second administration is granted, the record of which repels the presumption of its necessity, an order of sale made in the course of such administration is void, and a sale thereunder confers no title upon the purchaser.

TRESPASS to try title, and for damages. Verdict and judgment were for the defendant, and the plaintiffs prosecute their writ of error. The opinion states the case.

Harcourt and Robson, for the plaintiffs in error.

Ballinger and Jack, R. L. Foard, and H. T. Garnett, for the defendant in error.

By Court, BELL, J. The plaintiffs in this suit are the surviving wife and the children of R. W. Withers, deceased. They claim the land in controversy by a chain of title from the original grantee of the government, Henry Harrison. Henry Harrison died in Colorado County in the early part of the year A. D. 1837. In the month of March, A. D. 1837, Abram Alley was appointed administrator of the estate of Harrison. He continued to act in the capacity of administrator of the estate until the July term, 1840, of the probate

court, at which time he presented his final account, showing a balance due him by the estate of two hundred and eighty-nine dollars and eighty-four cents (\$289.84). The court made a decree discharging Alley from the further administration of the estate, but there was no formal decree entered that the estate was found to have been fully administered. At the September term, 1840, of the probate court, one Wadham was appointed administrator of the estate, and proceeded with the administration, paying the debt due by the estate to Alley, paying taxes, surveying fees and fees of court, collecting money due to the estate from the previous sale of land, etc., until the April term, 1842, of the court, when he presented his final account, showing a balance due him by the estate of \$3.83. This account was received by the court, and acted on as an account for final settlement, and Wadham was discharged from the administration, and released from further liability.

At the February term, A. D. 1843, William J. Jones was appointed administrator of the estate of Harrison. His petition for letters of administration has been lost from the records of the probate court, and we are therefore not informed of the grounds upon which the application was made. At the May term, 1843, Jones petitioned for a sale of all the estate of Harrison. His petition represented that "some small debts have been made against the estate for fees of office, etc., and that a sale of a portion of said estate is necessary to meet said debts." He further represented that the interest of the estate would be promoted by a sale of the entire estate, "under the law which provides for the disposition of estates, where no heirs shall claim within a period of nine years." Upon this petition the probate court ordered a sale of all the estate, both real and personal, upon a credit of twelve months; and further ordered that when the purchase-money was collected, the administrator should pay all the debts of the estate, and then pay the balance into the treasury of the republic, "according to the provisions of the law made and provided for absent or non-resident heirs." Jones proceeded to sell the land belonging to the estate. The tract in controversy was purchased by Joseph G. Ball. Ball sold the land to Abner S. Lipscomb, and Abner S. Lipscomb sold to Robert W. Withers.

On the trial of the cause in the court below the judge instructed the jury "that the administration of the estate of Henry Harrison was closed and at an end before the grant of

administration to Jones, and that any sale afterwards made would confer no title, the court having no jurisdiction to grant administration."

This instruction is expressed in strong terms, but when considered in connection with the testimony before the court we are of opinion that the instruction is not erroneous.

There is, perhaps, no subject in reference to which it is more difficult to lay down precise rules by which every case can be clearly and certainly determined than the subject of the jurisdiction of courts. It is a subject, too, about which much has been loosely said; and it has only been occasionally that superior minds have closely considered the principles involved, and have undertaken to define, with care, the boundaries of the jurisdiction of courts which are said to have general jurisdiction, and the circumstances under which their jurisdiction will and will not attach. The word "jurisdiction" itself seems to be often used without any determinate signification. We do not propose to enter at length upon this subject, but will content ourselves by attempting to state a few propositions which will suffice for the determination of the case before us.

The jurisdiction of a court means the power or authority which is conferred upon a court, by the constitution and laws, to hear and determine causes between parties, and to carry its judgments into effect. It is a plain proposition that a court has no power to do anything which is not authorized by law. The powers of our county courts in respect to the estates of decedents are all conferred by statute. Whatever the statute authorizes the court to do, it may rightfully do. But it does not follow because the statute authorizes the court to order the sale of land under certain circumstances that all sales of land by order of the court are authorized.

It is no difficult matter to determine under what circumstances the law authorizes the court to order the sale of land; and it is certainly true that if the court orders a sale of land when the circumstances do not exist which, under the law, authorize it to do so, it acts in doing so without jurisdiction, or in other words, without authority. These are plain propositions. The difficulties which are presented to courts arise in cases where there is a deficiency of proof as to the circumstances under which the court acted in ordering the sale.

The question presented in such cases is, How far is proof (which is wanting) to be supplied by presumption? In the absence of proof there undoubtedly always arises a presump-

tion that a court of general jurisdiction has acted, in doing a thing which it has the power under certain circumstances to do, within the limits of its authority. The presumption is that the court has done what it was right to do, and not that it has done a wrong. The circumstances which would have authorized the court to act as it did act are presumed to have existed. But presumptions are indulged in the absence of proof, and not against proof. This court has repeatedly gone very far to sustain administration, but the principles above stated have been often announced by this court, and, it is believed, have generally controlled its decisions. It is sometimes said that a purchaser at administrator's sale is not bound to look beyond the judgment of a court of competent jurisdiction; and it is often said that an order of sale and a sale under the order are effectual to pass the title to the purchaser; but it is always understood that the jurisdiction of the court has been rightfully called into exercise, and that the order of sale is a valid order. If letters of administration were granted upon the estate of a living man because he had been committed to the penitentiary for twelve months, and the record showed the fact, it could never be held that an order of sale of his land, and a sale in conformity with the order, and a formal decree of confirmation, would pass the title to the purchaser. And why not? Here would be a judgment of a court of competent jurisdiction. Here would be an order of sale and a sale under it; but the whole would be a nullity, because the jurisdiction of the court was never rightfully called into exercise; or in other words, because the facts did not exist which authorized the court to grant letters of administration and make the order of sale. There exists in the minds of some a loose idea that because the court has jurisdiction to order the sale of land, its jurisdiction is exercised whenever it orders a sale; and it is said that if a court determines any question of fact necessary to support its jurisdiction, its determination or judgment can never be collaterally impeached. This cannot be universally true; because in the case of an administration upon the estate of a living man, the court necessarily determines that the man is dead, and yet the man may be shown to have been alive at the time of the judgment; and in such case, although every step in the proceedings by which the man's estate is sold may have been taken with the most perfect regularity, and although the purchaser buys in good faith, no title passes or can pass. This shows that the court only

administration to Jones, and that any sale afterwards made would confer no title, the court having no jurisdiction to grant administration."

This instruction is expressed in strong terms, but when considered in connection with the testimony before the court we are of opinion that the instruction is not erroneous.

There is, perhaps, no subject in reference to which it is more difficult to lay down precise rules by which every case can be clearly and certainly determined than the subject of the jurisdiction of courts. It is a subject, too, about which much has been loosely said; and it has only been occasionally that superior minds have closely considered the principles involved, and have undertaken to define, with care, the boundaries of the jurisdiction of courts which are said to have general jurisdiction, and the circumstances under which their jurisdiction will and will not attach. The word "jurisdiction" itself seems to be often used without any determinate signification. We do not propose to enter at length upon this subject, but will content ourselves by attempting to state a few propositions which will suffice for the determination of the case before us.

The jurisdiction of a court means the power or authority which is conferred upon a court, by the constitution and laws, to hear and determine causes between parties, and to carry its judgments into effect. It is a plain proposition that a court has no power to do anything which is not authorized by law. The powers of our county courts in respect to the estates of decedents are all conferred by statute. Whatever the statute authorizes the court to do, it may rightfully do. But it does not follow because the statute authorizes the court to order the sale of land under certain circumstances that all sales of land by order of the court are authorized.

It is no difficult matter to determine under what circumstances the law authorizes the court to order the sale of land; and it is certainly true that if the court orders a sale of land when the circumstances do not exist which, under the law, authorize it to do so, it acts in doing so without jurisdiction, or in other words, without authority. These are plain propositions. The difficulties which are presented to courts arise in cases where there is a deficiency of proof as to the circumstances under which the court acted in ordering the sale.

The question presented in such cases is, How far is proof (which is wanting) to be supplied by presumption? In the absence of proof there undoubtedly always arises a presump-

tion that a court of general jurisdiction has acted, in doing a thing which it has the power under certain circumstances to do, within the limits of its authority. The presumption is that the court has done what it was right to do, and not that it has done a wrong. The circumstances which would have authorized the court to act as it did act are presumed to have existed. But presumptions are indulged in the absence of proof, and not against proof. This court has repeatedly gone very far to sustain administration, but the principles above stated have been often announced by this court, and, it is believed, have generally controlled its decisions. It is sometimes said that a purchaser at administrator's sale is not bound to look beyond the judgment of a court of competent jurisdiction; and it is often said that an order of sale and a sale under the order are effectual to pass the title to the purchaser; but it is always understood that the jurisdiction of the court has been rightfully called into exercise, and that the order of sale is a valid order. If letters of administration were granted upon the estate of a living man because he had been committed to the penitentiary for twelve months, and the record showed the fact, it could never be held that an order of sale of his land, and a sale in conformity with the order, and a formal decree of confirmation, would pass the title to the purchaser. And why not? Here would be a judgment of a court of competent jurisdiction. Here would be an order of sale and a sale under it; but the whole would be a nullity, because the jurisdiction of the court was never rightfully called into exercise; or in other words, because the facts did not exist which authorized the court to grant letters of administration and make the order of sale. There exists in the minds of some a loose idea that because the court has jurisdiction to order the sale of land, its jurisdiction is exercised whenever it orders a sale; and it is said that if a court determines any question of fact necessary to support its jurisdiction, its determination or judgment can never be collaterally impeached. This cannot be universally true; because in the case of an administration upon the estate of a living man, the court necessarily determines that the man is dead, and yet the man may be shown to have been alive at the time of the judgment; and in such case, although every step in the proceedings by which the man's estate is sold may have been taken with the most perfect regularity, and although the purchaser buys in good faith, no title passes or can pass. This shows that the court only

exercises its jurisdiction when the facts exist which authorize it to do the thing in question. And the question whether the jurisdiction of a court has been exercised or not is solved by ascertaining whether or not the facts existed which authorized the court to act as it did act.

But the difficulty still remains of determining under what circumstances a party who seeks to impeach the judgment of a court will be permitted to do so. And here, in respect to the county or probate courts, it is important to keep before the mind the distinction between the orders or judgments of a court made or rendered in the progress of a rightful administration, touching matters concerning which the court has the right to deliberate and to decide, and orders or judgments which the court has not the power to make or to render, or has the power to make or to render only under certain circumstances and for certain purposes. Orders or judgments of the first class can never be collaterally impeached, because, however erroneous they may be, they are not void. Orders or judgments which the court has not the power under any circumstances to make or render are, of course, null, and being null, their nullity may be asserted in any collateral proceeding where they are relied on in support of a claim of right. It is the other class of orders or judgments, those which the court has the power to make or render only under certain circumstances and for certain purposes, about which the greatest difficulties arise. I will attempt to illustrate my meaning in reference to the different classes of orders and judgments alluded to by the statement of a few examples. The county court, in the progress of a valid administration, has power to make partition of an estate amongst the heirs. Incidental to this is the duty of determining who are the heirs, and the extent to which they are respectively entitled. Let us suppose that the court determines A to be one of the heirs, when in truth he is not an heir. This judgment of the court is erroneous, but it is not void. Being erroneous only, the error must be corrected by appeal or *certiorari*, or by such other process as the law authorizes for that purpose. It cannot be collaterally impeached. So, if some of the heirs are of the whole blood and some of the half-blood, and the court commits ever so palpable an error in determining the amount of their respective shares. These are matters which are committed to the court to deliberate upon and to decide, and a party will not be permitted to acquiesce for the time in an erroneous judgment,

and to impeach it afterwards in a collateral proceeding. So, too, the law which confers upon the court its powers gives certain directions as to the manner in which some of those powers are to be exercised, and prescribes the order of time in which certain things shall be done, and the formalities which shall be observed either by the administrator or the court. The law confers upon the court (I mean the county court) the power to cause any of the property of an estate to be sold for the payment of debts, but provides (perhaps unwisely) that the slaves belonging to an estate shall not be sold (except in certain cases) until all other property subject to the payment of debts has been first sold. I think this proviso must be understood as directory to the court, and not as a limitation upon the power of the court; and if the court should order a sale of a slave belonging to an estate before selling all the other property subject to the payment of debts, the action of the court would be irregular and erroneous, but not void, and not impeachable collaterally. The law requires an administrator to return an account of the sale of property within thirty days after the day of sale. This is directory, and the account of sale may be returned and received after the expiration of thirty days from the day of sale. The law makes it the duty of an administrator, so soon as he shall ascertain that it is necessary, to make application in writing for the sale of property for the payment of debts, and the application is to be accompanied by a statement of the expenses of the administration, of the claims against the estate, etc. But I suppose there can be little room to doubt that an order of sale by the court, and a sale in conformity with it, and a subsequent ratification by the court, would pass the title to the purchaser, although there had been no application in writing by the administrator, with the accompaniments enumerated in the statute; in other words, that the action of the court would be held to be irregular only, not void.

The case of an administration upon the estate of a living man has already been given as an example of the absolute nullity of the proceedings of a probate court, even where every step has been taken with perfect regularity: and it is well to bear in mind that in this case the proceedings of the court are absolutely null because the case is not one upon which the court has the right to deliberate, and not for any other reason.

Concerning those orders and judgments which the county

court has the power to make or render only under certain circumstances and for certain purposes, I will endeavor to communicate my views by a very few observations and examples. In the first place, it is to be borne in mind that, while the county court has the power to order the sale of land belonging to an estate which is committed to it for the purpose of administration, it has no general power to sell the lands of any estate. Its power to order the sale of the land of an estate lies within very narrow limits. It can order the sale of the land of an estate for the payment of debts and expenses of administration, to raise the amount of the allowance for the surviving wife and children, and in certain cases, for the purposes of partition and distribution amongst the heirs. The court has no power conferred upon it by law to sell the land of an estate for any other purpose. Let us suppose that the administrator of an estate should represent to the court that the debts of the estate were all paid; that the property of the estate consisted of several valuable tracts of land; that the only heir was possessed of an estate of his own adequate to all his wants; and that it would be a matter of great public advantage to sell the land of the intestate's estate for the purpose of building a college (the case put in the brief of the counsel for the appellee),—could it be contended that court would have the power to order the sale? And if the court has not the power to order the sale, can any title pass to the purchaser? I am of opinion that the court has no power, in such a case, to order the sale of land, and that no title can pass to the purchaser at a sale made in pursuance of such an order, and this whether the purchaser has knowledge of the facts or not. I think the purchaser is chargeable with notice of whatever appears of record in the court showing that the court has transcended its powers; but it is not for this reason that he acquires no title by his purchase: the reason lies further back, and is to be found in the want of power (or jurisdiction) in the court to order the sale. Such a sale, being a nullity, may be impeached collaterally; and when the want of power in the court to order the sale is shown by the record itself, then the constructive notice which the record furnishes to the purchaser makes the nullity operative as to him, and destroys his claim of title.

Let us suppose that A, being the owner of lands, dies intestate, and his estate is committed to the county court for administration. Let us suppose that a certain tract of land

belonging to the estate is sold upon the petition of the administrator, and purchased by B; that the sale is confirmed by the court, the purchase-money paid by B, and title made to him by the administrator. Let us suppose that afterwards, in the progress of the same administration, the administrator applies with all formality for the sale of the same land, that the court orders the sale, that the administrator sells in obedience to the order, and the land is purchased by C, the sale to him confirmed, the purchase-money paid, and a deed duly executed by the administrator. Has C in such a case acquired any title to the land? Certainly not. And why? Simply because the court had no power to order the sale at which he purchased. The land did not belong to the estate. The power of the court to order the sale of the land had been exercised and exhausted. Yet C may have been entirely ignorant of all this, and independent of the former proceedings of the court, would be able to exhibit a good title in himself. But when the former proceedings of the court are shown, then it is manifest that C's title or claim of title is an absolute nullity; and this, not because C was chargeable with notice of B's title, but because of a total want of power in the court to make the second order of sale. Whenever there is a want of power in the court its act is a nullity, no more and no less in one case than in every other, and without any regard to the particular facts or circumstances.

I conclude, then, that a *bona fide* purchaser at an administrator's sale, made in pursuance of an order which the court had the power to make, takes a good title, and is not affected by any irregularities in the proceedings of the court. I mean that he takes a title which cannot be impeached collaterally. If the case is one of a grant of administration when the court had no power to grant letters of administration, all the proceedings of the court in the progress of such an administration are null and void, and may be shown to be so in any collateral proceeding in which they are relied on to support a claim of right. And in the case of a rightful administration, every order or judgment which the law has not conferred upon the court the power to make or render is a nullity, and may be impeached collaterally by showing from the record itself the want of power in the court to make or render the order or judgment in question. If the record is silent, and the order or judgment is one which the court has power, under any circumstances, to make or render, then it will be presumed that

the circumstances existed which authorized the court to make or render the order or judgment in question; but presumptions will not be indulged which are repelled by the record itself.

It is also to be remarked that the power of a court to grant letters of administration in any particular case depends upon the facts as they exist at the time the letters are granted; and if the court had not the power to grant letters of administration, none of the proceedings in the course of such an administration can have any validity in favor of any person on the ground that such person was ignorant of the want of power in the court to grant the letters of administration.

As to the case before us, the records of the probate court of Colorado County showed that the estate of Henry Harrison, for all purposes except partition and distribution, had been fully administered by the second administrator, Wadham. His final account, it is true, showed a trifling balance due him by the estate, but he does not appear to have claimed payment of this small sum, and the presumption would arise from his discharge without asking payment that he remitted the debt to the estate. Besides, the sum was so inconsiderable that the rule *de minimis non curat lex* might well be applied to it. Upon the discharge of Wadham from the administration, the estate vested in the heirs. Indeed, it is the settled doctrine in this state, that upon the death of the ancestor the estate vests in the heirs, and that the administrator acquires only a qualified interest in the estate for the purposes of administration. Under the circumstances attending the estate of Henry Harrison, as disclosed by the records of the probate court of Colorado County, we do not mean to say that the court did not have the power, under any circumstances, to grant a further administration of the estate after the discharge of Wadham. But the estate appeared to have been fully administered, and the court had no power to grant further letters of administration, unless a necessity was shown for such further administration. And here, if the record was entirely silent, or did not forbid such a presumption in a collateral proceeding like the present, the presumption would perhaps be indulged, that the necessity for a further administration was shown to the court. But we are of opinion that the whole record of Jones's pretended administration repels the presumption that any necessity for a further administration after the expiration of Wadham's administration was shown or could have existed. And this view leads us to the

conclusion that the court below did not err in the instruction given to the jury. The judgment of the court below is therefore affirmed.

I have not made reference to authorities in this opinion, because the decisions of this court upon the subject of the jurisdiction of the county or probate courts are familiar to the profession throughout the state, as are also the principal cases decided by other courts, which have been frequently cited by this court, and which will be found cited in the very able briefs of the counsel.

Judgment affirmed

COURTS OF GENERAL JURISDICTION ARE PRESUMED TO HAVE HAD JURISDICTION until the contrary appears. Their proceedings are presumed to be regular within the scope of their authority: *Butcher v. Bank of Brownsville*, 83 Am. Dec. 446, and note citing prior cases 451; *Callen v. Ellison*, 82 Id. 448. The principal case is cited to this point in *Guilford v. Love*, 49 Tex. 741; and to the point that the judgments of courts of limited jurisdiction cannot be aided by legal presumptions, in *Walker v. Myers*, 36 Id. 252.

JUDGMENT OF COURT HAVING NO JURISDICTION of the persons or subject-matter is void, and collaterally impeachable: *Butcher v. Bank of Brownsville*, 83 Am. Dec. 446, and note 450. The principal case is cited to the point that orders and judgments which the court has no power under any circumstances to make or render are null, and being null, their nullity may be asserted in any collateral proceeding where they are relied on in support of a claim of right: *Trammel v. Philleo*, 33 Tex. 410.

JURISDICTION DEFINED: See *Callen v. Ellison*, 82 Am. Dec. 448.

JURISDICTIONAL FACTS, SUCH AS SERVICE OF PROCESS UPON PARTY, or waiver thereof, are conclusively presumed in the case of a judgment of a domestic court of general jurisdiction, unless the record itself shows the contrary: *Callen v. Ellison*, 82 Am. Dec. 448; *Coit v. Haven*, 79 Id. 244, and note 249. The principal case is cited to this point in *Mitchell v. Menley*, 32 Tex. 464; *Black v. Epperson*, 40 Id. 179.

PROBATE COURTS, WHETHER COURTS OF GENERAL OR LIMITED JURISDICTION: See *Snyder's Appeal*, 78 Am. Dec. 372, and note 374; *Overseers of the Poor v. Gullifer*, 77 Id. 265, note 266; *Kimball v. Fisk*, 75 Id. 213, and note 219. The principal case is cited to the point that the county court in probate matters is a court of general jurisdiction, and its orders and judgments are shielded from collateral attack and guarded by the same presumptions in favor of their validity as those of any other court of general jurisdiction: *Guilford v. Love*, 49 Tex. 740.

ORDER OF SALE BY PROBATE COURT IN ABSENCE OF CIRCUMSTANCES GIVING IT JURISDICTION to make the order is void: See *Wyatt's Adm'r v. Rambo*, 68 Am. Dec. 89, note 100; *Salmond v. Price*, 42 Id. 204; *Adams's Lessee v. Jeffries*, 40 Id. 477; *Bloom v. Burdick*, 37 Id. 299, note 308; *Heath v. Wells*, 16 Id. 383. The principal case is cited to the point that the county court can order a sale of property of the estate of a decedent only where it is necessary to pay debts: *Hamblin v. Warnecke*, 31 Tex. 94; or where it is authorized to do so by statute: *Marks v. Hill*, 46 Id. 351; and that a sale ordered by the probate court for any other purposes than such as are specified

by law is a nullity, and may be impeached collaterally: *Merrivether v. Kennard*, 41 Id. 277. But if the record states sufficient facts to justify the court in making the sale, the order cannot be collaterally impeached: *Iverson v. Loberg*, 79 Am. Dec. 364, note 366; *Fitzgibbon v. Lake*, 81 Id. 302, and note 304; and the necessity for the sale will be presumed in the absence of all record evidence, is held in *Doolittle v. Holton*, 67 Id. 745, and note 748.

DETERMINATION OF JURISDICTIONAL FACTS CANNOT BE COLLATERALLY ATTACKED: *Wyatt's Adm'r v. Rambo*, 68 Am. Dec. 89; *Gunn v. Howell*, 62 Id. 785; *Callen v. Ellison*, 82 Id. 448; *Coit v. Haven*, 79 Id. 244, and note 249; *Fitzgibbon v. Lake*, 81 Id. 302, and note 304.

PURCHASER AT ADMINISTRATOR'S SALE WILL BE PROTECTED where the order of sale is regular on its face and issues from a court of competent jurisdiction: *Overton v. Cranford*, 78 Am. Dec. 244, and note 246.

VALIDITY OF GRANT OF ADMINISTRATION: See note to *Ex parte Maxwell*, 79 Am. Dec. 65, 66. Grant of administration of the estate of a living person is void: Id.; *Moore v. Smith*, 73 Id. 122, and note 126; *Andrews v. Ivory*, 73 Id. 355, and note 356. But if the court has jurisdiction to grant letters of administration, the regularity of the grant is not collaterally attackable: *Broughton v. Bradley*, 73 Id. 474, and note 484. The probate court cannot reopen the succession after it has been once administered and closed, and a grant of administration under such circumstances is void and collaterally impeachable: *Fisk v. Norvel*, 58 Id. 128, and note 134. The court expresses the opinion in *Gulford v. Love*, 49 Tex. 748, that the completion of a partition is not a sufficient justification for reopening the administration of an estate after a lapse of twenty years, and cites among others *Fisk v. Norvel*, *supra*, and the principal case. In *Kleinecke v. Woodward*, 42 Id. 314, it is held that an original grant of letters of administration is not void because the reason or necessity for the administration does not appear on the face of the proceedings, and that the principal case does not hold contrary to this proposition.

LAPSE OF TIME AFFECTING CLAIMS UNDER VOID PROCEEDINGS. — In *Hudson v. Jurnigan*, 39 Tex. 587, it is said that the doctrine of the principal case, that where a court has no power to grant letters of administration, all proceedings of the court in the progress of such administration are null and void and collaterally attackable will not help out a claim which must be regarded as stale and to which the doctrine of estoppel *in pais* evidently applies. And in *Betts v. Shotton*, 27 Wis. 670, it is held, citing the principal case, that after the five years limited by statute within which the heir or any one claiming under a deceased person must bring his action to recover land sold by the administrator or executor by order of the probate court, that court cannot revise and correct its former proceedings so as to divest title acquired through such sale.

HADLEY v. UPSHAW.

[27 TEXAS, 547.]

RULE THAT INTERROGATORIES MUST BE CROSSED to give both parties the right to introduce the answers to them in evidence does not apply to interrogatories addressed by one party to the suit to the other party.

PARTY CANNOT BE PERMITTED TO ADDRESS INTERROGATORIES TO OPPOSITE PARTY, and then decline to read his answers, and thereby deprive the party answering of the right to read the answers in evidence.

INNKEEPER IS NOT LIABLE FOR LOSS OF GOODS OF GUEST, if loss is occasioned by the want of that ordinary care on the part of the guest which a prudent man may be reasonably expected to take under all the circumstances of the case; and whether or not the guest has exercised such ordinary care is always a question of fact for the jury.

ACTION by appellee against the appellant to recover fifty dollars and the value of a gold watch and Masonic emblem, which were stolen from the room of the plaintiff in the hotel kept by the defendant. The defendant pleaded specially that the loss was occasioned by the negligence of the plaintiff, in not locking the door of his room. The defendant propounded interrogatories to the plaintiff, but at the trial refused to read them and the answers made to them by the plaintiff, and the latter then offered them in evidence himself. The defendant objected to their admission, on the ground that the plaintiff had not crossed the interrogatories, but the court overruled the objection. Verdict and judgment were for the plaintiff, and a new trial being refused, the defendant appealed.

L. A. Thompson and C. B. Sabin, for the appellant.

Rogers and Willie, for the appellee.

By Court, **BELL, J.** We are of opinion that the court below did not err in permitting the plaintiff below to read in evidence his own deposition. The defendant had propounded interrogatories to the plaintiff, in accordance with the provisions of the act of the 5th of February, 1858. The defendant declined to read the answers of the plaintiff, and objected to their introduction by the plaintiff, on the ground that the interrogatories had not been crossed by the plaintiff. The rule that interrogatories must be crossed in order to give both parties the right to introduce the answers to them in evidence does not apply to the case of interrogatories addressed by one party to the suit to the other party. The fourth section of the act of February 5, 1858, provides that "the party interrogated, whether orally or otherwise, may, in answer to questions propounded, state any matter connected with the cause and pertinent to the issue to be tried." This implies that the party interrogated need not cross interrogatories addressed to himself. We do not think a party can be permitted to address interrogatories to the opposite party, and then decline to read his answers, and thereby deprive the party who has answered of the right to read the answers in evidence. When a party propounds interrogatories to his adversary, he thereby qualifies him as a witness in the case, and he ought to be held to take the consequences.

We are of opinion, however, that there was a misdirection in the charge of the court to the jury. The first paragraph of the charge of the court stated with great accuracy the general principle in respect to the liability of innkeepers for the loss of the goods of their guests. But in the second branch of the instruction, when the court spoke with reference to the particular case before the jury, we think there is error. The court said: "If, from the evidence, you believe that the defendant kept a public house for lodging and boarding transient persons or travelers for pay, and that the plaintiff was received as a lodger, and that he then had in his possession the articles alleged to have been lost, or any part of them, and that they, or any of them, were stolen from the room where he lodged in the tavern, and that it is not shown that the loss resulted from the gross neglect of the plaintiff in exposing the articles to greater risk than he should have done, then you will find for the plaintiff," etc.

We believe the rule of the law to be, that the innkeeper will not be liable for the goods of his guest, if the loss is occasioned by the want of that ordinary care on the part of the guest which a prudent man may be reasonably expected to take under all the circumstances of the case; and the question whether or not the guest has taken such ordinary care is always a question of fact for the jury. The rule which we have here announced was laid down by the court of queen's bench, in the case of *Cashill v. Wright*, 37 Eng. L. & Eq. 177. The same rule was previously intimated by Lord Campbell, in the case of *Armisted v. White*, 6 Id. 349, and has been recognized in New York, in the case of *Fowler v. Dorlon*, 24 Barb. 384.

If the court below had instructed the jury particularly as to the legal meaning of gross negligence, the judgment might perhaps have been sustained upon the facts of the case, notwithstanding the misdirection to which we have referred. We see no error in any other part of the charge of the court; but for the error which has been pointed out, the judgment is reversed and the cause remanded.

Reversed and remanded.

LIABILITY OF INNKEEPERS, AND WHAT NEGLIGENCE ON PART OF GUEST will exempt innkeeper from his liability for loss of property: See *Burrows v. Trieber*, 83 Am. Dec. 590, and note 592; note to *Pettigrew v. Barnum*, 69 Id. 221.

ANSWER OF DEFENDANT TO INTERROGATORIES PROPOUNDED BY PLAINTIFF has the effect of a deposition: *Short v. Tinsley*, 71 Am. Dec. 482.

AYRES v. DUPREY.

[27 TEXAS, 598.]

RETURN OF SHERIFF IS PRIMARY EVIDENCE OF HIS ACTION, and as a general rule, in the absence of fraud or mistake it cannot be varied or contradicted by his parol testimony.

WITNESS IS INCOMPETENT TO TESTIFY AS TO CHARACTER OF ANOTHER WITNESS for truth and veracity when his belief is based upon his individual opinions and feelings, and not upon his knowledge of the reputation of the witness for veracity in the community in which he lives.

TESTIMONY OF WITNESS CANNOT BE CONTRADICTED BY PROOF OF INCONSISTENT DECLARATIONS and statements, without first laying a predicate for so doing by inquiring of him as to the alleged statements, and thus affording him an opportunity of meeting or explaining them.

INQUIRY, ON IMPEACHMENT OF WITNESS, SHOULD BE CONFINED TO HIS GENERAL CHARACTER FOR TRUTH, and should not extend to his general moral character.

MOTION FOR CONTINUANCE OF CAUSE IS ADDRESSED TO DISCRETION OF COURT, and its decision will not be interfered with unless injury or injustice to the parties have plainly resulted from it.

COVENANTOR IN WARRANTY WHICH DOES NOT RUN WITH LAND IS COMPETENT WITNESS without release in favor of grantee of the covenantor's grantee against an adverse claimant; and if the covenant does run with the land, or if the plaintiff has an equitable right to enforce it, a proper release will render the covenantor a competent witness in behalf of the plaintiff.

FAILURE TO APPRAISE LAND ON DAY OF SALE, UNDER EXECUTION, as required by plain terms of the statute, is not obviated by a previous appraisement, and renders the sale irregular, erroneous, and voidable, but not void.

SHERIFF'S DEED CANNOT BE IMPEACHED IN COLLATERAL ACTION because of irregularity in the sale, even though the plaintiff in execution is one of the parties to the collateral suit.

DEFENDANT IN TRESPASS TO TRY TITLE, IF HE CAN HAVE IN THAT ACTION EQUITABLE RIGHT, as against plaintiff, to avoid sheriff's deed for irregularities in the sale, cannot have this relief under plea of not guilty, but must plead specially, bringing in all necessary parties.

PLEA OF NOT GUILTY IN ACTION OF TRESPASS TO TRY TITLE admits only such defenses as are applicable to that action.

BONA FIDE PURCHASERS AT EXECUTION SALES ARE AS FULLY PROTECTED BY REGISTRATION LAWS against prior unrecorded deeds, according to the better authority, as those who claim by direct and immediate conveyances.

EXECUTION CREDITOR WHO PURCHASES LAND OF DEBTOR AT EXECUTION SALE, though not a *bona fide* purchaser, is protected against a prior unrecorded deed from the debtor by virtue of registration laws which protect "all subsequent purchasers and creditors," provided he had no notice of the deed before his judgment became a lien on the property.

ONLY SUCH CREDITORS AS HAVE SECURED SOME CHARACTER OF LIEN UPON LAND before notice of an unrecorded deed are within the registration law protecting "all subsequent purchasers and creditors."

TRESPASS to try title. Both parties claimed under one Johnson, to whom the land was patented. The plaintiff, Ayres, claimed under a sheriff's deed, and proved that upon a judgment recovered by one Pillsbury against Johnson an execution issued and was levied upon certain land belonging to Johnson; that at the sale Johnson became the purchaser, and executed his "twelve months' bond" for the purchase-money, with the plaintiff, Ayres, and another as his sureties; that this bond became forfeited for non-payment; and about six years after its execution, in 1846, an execution was issued and levied upon the land of Johnson; but this land not bringing the full amount of the execution, another writ issued on the 10th of July, 1847, and was levied upon the land in controversy as the property of Johnson; and at the sale thereof on the 7th of September, 1847, Ayres became the purchaser, and received a deed from the sheriff, dated May 27th, 1848, and filed for record September 28, 1848. The appraisement of the land in question was dated July 19, 1847, and the plaintiff offered the deposition of the sheriff "to prove that the land was legally sold, and that the appraisement was made regular, and to take effect on the day of sale." The defendant objected, on the ground that the appraisement was in writing, and had been filed in the case. Objection sustained, and exception. The plaintiff also offered the deposition of F. H. Ayres and the testimony of A. H. Phillips for the purpose of impeaching the testimony of defendant's witness Johnson; but the evidence was excluded upon objection, and the plaintiff excepted. The defendant, in support of his claim to the property, read in evidence a deed of the land from Johnson to one Gray, dated and acknowledged July 24, 1847, but not filed for record until November 12, 1855. This deed contained a covenant to warrant the title to Gray, his heirs, etc. The defendant also read a quitclaim deed from Gray to himself, dated and acknowledged in 1850, and filed for record November 12, 1855. The defendant further offered the deposition of Johnson, the person from whom both parties deraigned title, to which was attached a release executed by the defendant to the witness, acquitting him of all liability on his covenant of warranty in the deed to Gray. To the admission of this deposition the plaintiff objected, and his objection was overruled. The deposition tended to show that the plaintiff, Ayres, had notice of the unrecorded deed to Gray some time before the sale of the land at which he became the purchaser. The defendant also read

the deposition of Gray, in which deponent stated that in 1852 or 1853, hearing of the plaintiff's claim to the land, he went to see the plaintiff in behalf of Duprey, and the plaintiff said that the judgment under which the land was sold was against Johnson and himself, as Johnson's security, and that he had the execution issued thereon, and the land sold; and upon the witness making inquiry as to the plaintiff's authority to control the execution to which he was a defendant, the plaintiff answered that he, as surety for Johnson, had settled the judgment, and had the execution issued for his own benefit. Verdict and judgment were for the defendant, and a new trial being refused, the plaintiff appealed.

R. M. Tevis and B. F. Fly, for the appellant.

J. T. Harcourt, for the appellee.

By Court, MOORE, J. No injury resulted to Ayres from the exclusion from the jury of the deposition of Ryan, the former sheriff of Lavaca County. It was intended to show by his testimony that the land in controversy had been appraised as required by law before it was sold by him under the judgment and execution against Johnson, through which Ayres claims title. The return of the sheriff and the appraisement of the land, which he caused to be made, were before the court, and unquestionably are the primary and best evidence of his official action. As a general rule, and in the absence of fraud or mistake, it certainly cannot be maintained that the official return of the sheriff can be varied or contradicted by his parol testimony. But an inspection of his deposition, which was excluded, and his affidavit attached to the motion for a new trial, makes it quite manifest that his testimony would have added no strength to the case. It is very obvious that the appraisement to which he refers is the same which was returned with the execution, and which was before the court. If, however, there was really another appraisement it was altogether immaterial, since from his testimony there was the same defect in it which was charged upon the one in evidence before the jury.

The objections to the deposition of F. H. Ayres were also properly sustained. This deposition was offered for the purpose of contradicting the testimony and impeaching the character of Johnson, who testified in the case on behalf of the defendant, Duprey. But we are clearly of the opinion that an inspection of the deposition shows that the witness Ayres did

not show himself qualified to speak with reference to the character of Johnson for truth and veracity. His belief seems to be based upon his individual opinions and feelings, and not upon his knowledge of Johnson's reputation in the community in which he lived, as to which this witness appears to be wholly uninformed. Nor could Johnson's testimony be contradicted by proof of declarations and statements by him, inconsistent with his present testimony, without laying a predicate for so doing by first inquiring of him as to those alleged statements, and thus affording him an opportunity of meeting or explaining them.

Nor did the court err in refusing to receive the testimony of Phillips, also offered for the purpose of impeaching the character of the witness Johnson. He says that he was acquainted with Johnson's general character in the community in which he lived a number of years previously, and from that general character he would not believe him on oath. It is unnecessary at present to inquire whether the lapse of time since the witness had known anything about Johnson's character would not alone have disqualified him from testifying. The rule governing the court in receiving testimony to impeach the character of a witness was most elaborately examined by this court in the case of *Boon v. Wethered*, 23 Tex. 675, and upon a thorough examination of the authorities, it was held in the impeachment of a witness the inquiry should be confined to his general character for truth, and should not extend to his general moral character.

No injury is shown to have been done by the refusal of the court to continue or postpone the cause on account of the absence of two of the plaintiff Ayres's counsel. Matters of this kind are addressed to the discretion of the court trying the case, and its decision will not be interfered with, unless injury or injustice to the parties have plainly resulted from it.

The objection of Ayres to the deposition of Johnson was properly overruled. The release of the witness was authenticated in strict accordance with the recognized construction of the statute and the former decisions of this court. If, however, as Ayres's counsel insist, the covenant of warranty in Johnson's deed to Gray does not run with the land, and pass by the quitclaim deed of Gray to the defendant, Duprey, Johnson undeniably had no interest in the result of this suit. The judgment in it worked no injury to Gray. It gave Duprey no right of action against him. And in a suit between Gray and

Johnson it could not be used as evidence of a breach of covenant, if such a suit could possibly be sustained by the former, after he had parted with his title to the land by a quitclaim deed, and when, consequently, he could not be injured by the subsequent failure of the title. But if the covenant of warranty ran with the land, and passed by the quitclaim deed of Gray to Duprey, or if the latter had in equity the right to enforce the covenant in the deed to Gray because he was acting as his agent, and the conveyance was really taken in trust for his benefit, the release was effectual, and restored the competency of the witness.

At the request of the defendant, Duprey, the jury were instructed, unless the land was appraised on the day of sale, its sale by the sheriff was a nullity, and the plaintiff, Ayres, acquired no title by his purchase under the execution sale. Whatever may have been the result of the case upon the other issues in it, this instruction necessarily precluded the jury from returning a verdict in favor of Ayres, and unless it can be sustained the judgment must unquestionably be reversed. An appraisement before a sale under execution was evidently required for the purpose of protecting defendants in execution against an undue and ruinous sacrifice of their property. It would seem that the true value of the property, if real estate, might be more fully ascertained by appraisers appointed before the day of sale, and who might thus have an opportunity of making a personal examination of the property, than by the appointment of appraisers on the day of sale, when, it is not unreasonable to suppose, they would often have no knowledge of its value, and would be forced to act upon unsatisfactory and doubtful information. The law, however, in plain terms requires the appraisement to be proceeded with on the day of sale. It gives the defendant in execution until that time to appear and exercise his privilege of selecting one of the appraisers. It may also be said to be the duty of the parties to the execution to bring with them to the place of sale competent appraisers; and if they fail in doing so, they justly incur the injury resulting from their neglect. At all events, the law is plain and unequivocal in its terms, and it is not for judicial or ministerial officers to disregard it. The failure to appraise the land upon the day of sale was, in our opinion, a departure from the provisions of the statute, which was not obviated by the previous appraisement; and the sale, consequently, must be regarded as an irregular or erroneous execution of the

process under which the sheriff was acting. The question still recurs, however, as to the effect which such irregularity will have upon the title under the sheriff's sale.

If the process under which the sheriff acts is absolutely void, or if he has no authority to make the sale, his act in doing so is a nullity, and the purchaser acquires no title. "But there is," say the court in *Sydnor v. Roberts*, 13 Tex. 598 [65 Am. Dec. 84], "a marked difference between that which confers the power to do a certain act and the rules which direct and regulate the mode of its execution. If the former be wanting, the act done is a nullity, and is to be taken as if nothing had been done; but if the latter be not strictly pursued, the acts done will not necessarily be void; or if void as to some persons and purposes, they will not necessarily be so as to all persons and for all purposes, but only as to the person who may have the right to avoid them, and will exercise that right in the proper manner and in proper time." In other words, if the sheriff is wanting in power to make the sale, the title claimed under it is void; but if there has been a defective or erroneous exercise of the power conferred upon him, the title of the purchaser under some circumstances may be avoided in the proper time and manner as to some persons and for some purposes. For though the court speak of the title as void, as to some persons and for some purposes, it is evident the word "void" is here used by the court, as is frequently the case, in its relative and not in its absolute sense. Did the power of the sheriff to sell the land of the defendant in execution depend upon the validity or regularity of the appraisement, or indeed upon the fact of there being any appraisement at all? We think not. We can see no reason for giving more potency to this provision of the statute than to its other requirements pointing out and directing the sheriff in the mode of executing the process, some of which were, like it, manifestly designed to guard the debtor against the fraudulent disposition of his property under color of legal process, or its undue sacrifice. The omission by the sheriff to give notice of the levy and sale may be much more detrimental to the interest of the defendant in execution than the failure to make an appraisement; yet it is most conclusively settled such an omission does not make the sale void, but only voidable, as to such parties as can take advantage of this defect, and this they must do in the manner which will be hereafter indicated. The supreme court of Georgia, in the case of

Brooks v. Rooney, 11 Ga. 423 [56 Am. Dec. 430], says: "The purchase depends upon the judgment, the levy, and the deed, and all other questions are between the parties to the judgment and the officer." Again: "We believe this to be sound doctrine, and that although the failure in the performance of any part of the sheriff's duty might subject him to an action in which he would be compelled to indemnify the owner of the land which might be irregularly sold, or the creditor to the extent of the injury received by such sale, yet it would not destroy the title of the purchaser, who has a right to presume that a public officer known to possess the power to sell has taken every previous step required of him by the law under which he sells." See also *Sullivan v. Hearndon*, 11 Id. 294; *Doe dem. Cooper v. Harter*, 1 Ind. 427; *Clark v. Watson*, 2 Id. 399. As to some parties, however, such irregular sales may be avoided; and of these unquestionably are the plaintiff in execution and such as purchase with notice of the defect in the sale. Thus in *Trotter v. Nelson*, 1 Swan, 7, it is said: "But it has been held in such case the plaintiff in the erroneous and voidable execution cannot be considered a *bona fide* purchaser; because, having actual or constructive notice of the error in the execution, it was a wrongful act in him to enforce it upon the property of the defendant. And as he cannot be permitted to take advantage of his own wrong, his title to the property so acquired will be avoided at the instance of the defendant": *Winston v. Otley*, 25 Miss. 451.

Such irregular execution of process may be set aside by motion in the court from which it issued; or, in some cases, on an appeal to the equity powers of the court in a proceeding directly for this purpose, when, with all the parties before the court, it can make its decree so as to relieve the one without detriment to the other: *Winston v. Otley*, 25 Miss. 451. It seems, however, to be abundantly settled, that the question of irregularity or error in the execution, or the proceeding under it by the sheriff, can never be discussed collaterally in another suit. It cannot be made a question, it has been said, in an action in ejectment. When a party in a collateral action claims title under a sheriff's deed the court cannot look into alleged irregularities in the process or proceeding of the sheriff. Nor could it in such a case make a decree avoiding the sale, and at the same time protect the interest of all parties whose interest would be thereby affected: *Jackson v. Robins*, 16 Johns. 537; *Thompson v. Phillips*, 1

Bald. 246; *Swiggart v. Harber*, 4 Scam. 364; *Pollard v. Cooke*, 19 Ala. 188.

The fact of the plaintiff in execution being one of the parties to the collateral suit does not vary the rule. In *Spafford v. Beach*, 2 Doug. (Mich.) 150, it is said that "the non-compliance by the sheriff with the requirements of the statute in regard to levy, advertisement, and sale of real estate is mere irregularity, and such irregularity must be complained of in due time by motion, or they will be waived." In *Doe dem. Cooper v. Harter*, 1 Ind. 427, which was an action of ejectment, one of the parties claimed through an execution issued on a dormant judgment. Smith, J., as the organ of the court, says: "We have not been referred to any case, nor have we been able to find one, where an irregularity of this kind, if it can properly be called an irregularity, has been held to invalidate the sale to a purchaser with notice. On the contrary, there are numerous cases in which the general principle is recognized, that such an irregularity cannot be objected to in a collateral suit, and in some of them the question arose with reference to purchasers with notice: *Doe dem. Cooper v. Harter*, 2 Ind. 252, and cases cited; also *Doe dem. Starke v. Gildart*, 4 How. (Miss.) 267; *Lee v. Crossna*, 6 Humph. 281; *Pollard v. Cooke*, 19 Ala. 188.

As the defendant, Duprey, was not a party to the record in the case from which the execution issued, under which Ayres claims, and as he acquired his title under a deed from the defendant in execution of a prior date to the levy of the execution, and may have been ignorant of the sale of the land by the sheriff until it was too late to effectually protect himself by a motion to quash the execution, it may be said, and probably correctly, that he would therefore be authorized to invoke the equitable powers of the court. And since there are no distinctions with us in legal or equitable actions, the facts before the court showing sufficient ground for avoiding Ayres's title, the court below, it is insisted, should have so ruled, and its judgment may upon this ground be sustained. Without questioning that a defendant in an action of trespass to try title might claim from the court equitable relief of this character, we cannot admit that this can be done merely by the answer of "not guilty"; and it was not done by any special answer in this case. In actions of trespass to try title, the defendant, it is true, is not required to put in any other plea than that of not guilty. The obvious mean-

ing of this is, however, that it is unnecessary for him to file any other plea to authorize him to make any defense applicable to this action; but unquestionably, if he wishes to assert an independent, equitable right, not involved in the issue as to title directly in controversy, he should present the facts by proper averments, and bring the necessary parties before the court to enable it to grant the relief to which he may be entitled.

It is suggested in the argument of counsel that Johnson having sold the land before the levy of the execution, although the purchaser failed to record the deed, he had no property in the land subject to the execution, and therefore no good could come from remanding the case. It is unquestionably a general rule that a judgment and execution attaches only to such interest as the defendant in execution may have in the property. But this general rule is made inapplicable to such cases as the present by a direct statutory enactment. Many cases may be easily found in which it is held that the lien of the judgment only attaches to the interest of the defendant at the time of its rendition, and when there had been a previous sale, as here, the title of the prior purchaser was declared to be unaffected by the subsequent sale under the judgment, although purchased by a stranger without notice. It is probable an examination of the statutes in the states where these decisions have been made will show that there is a material difference in the phraseology of their law and ours. In some of them it is probable the unrecorded deed is only avoided in favor of subsequent purchasers, and not, as with us, in favor of "all subsequent purchasers and creditors." These decisions seem to go upon the ground that since, as we have stated, the judgment lien could only attach to the then interest of the defendant in the property, and the purchaser could acquire by his purchase no greater interest than the defendant owned, or than the plaintiff was authorized to reach, he was consequently not within the spirit or intention of the law for the protection of subsequent purchasers against unrecorded deeds. Other courts, however, equally eminent for learning and ability, and, we think, upon better principle, hold purchasers at execution sales as fully within the protection of the registration laws as those who claim by direct and immediate conveyances: *Morrison v. Funk*, 23 Pa. St. 421; *Scribner v. Lockwood*, 9 Ohio, 184; *Massey v. Thompson*, 2 Nott & McC. 105; *Bellas v. McCarty*, 10 Watts, 13; *Byers v. Engles*, 16 Ark. 543; *Fosdick v. Barr*, 3 Ohio St. 471.

In the case of *Ellis v. Smith*, 10 Ga. 263, Lumpkin, J., says: "It has not been denied in the argument but that a purchaser at a sale on execution, who has his deed first recorded, will gain the same preference over a prior unrecorded conveyance as if he had bought directly from the debtor himself. For the effect of the sale by the law in this respect is just the same as if made by the individual whose agent or trustee the officer becomes, to make the transfer. All the defendant's estate is sold. The purchaser takes his place. The mischief of an unrecorded deed is the same to him as to a private purchaser. He examines the title, and from anything that appears, the defendant is the undisputed proprietor, while in fact there is an outstanding deed from him which would sweep off the property."

If, however, Ayres could only claim under the protection extended by the statute to subsequent purchasers, it could be successfully answered that he is not such a purchaser as comes within the meaning of the statute. It was only intended for the protection of *bona fide* purchasers. Courts will not permit its use as a means of perpetrating frauds. If a party has notice of the unrecorded deed, he can claim no benefit from the failure to record it. This, however, is a mere question of fact, with which, at present, we have nothing to do. But, evidently, only those who have paid a valuable consideration can claim to be *bona fide* purchasers. Does the plaintiff who purchases at his own execution sale and credits his bid on the execution stand in this category? It is held not. To constitute a person a *bona fide* purchaser, he must have advanced the consideration for the purchase. It will not constitute a *bona fide* purchaser, that the creditor bids off the premises, and applies the bid on his judgment. That is a precedent debt, and the consideration is not advanced upon the faith of the purchase: *Dickerson v. Tillinghast*, 4 Paige, 215 [25 Am. Dec. 528]; *Wright v. Douglass*, 10 Barb. 97.

But, as has been already said, creditors as well as purchasers are within the protection of our statute, and although Ayres may not be able to claim its protection in the latter character, he may probable be able to do so in the former. His right to do so depends upon the fact whether he had notice of the unrecorded deed from the defendant in execution prior to the time when he can claim his right became fixed, to call the statute to his aid for his security as a creditor. Actual notice or reasonable information of the unrecorded deed is certainly as

effectual against creditors as subsequent purchasers, and if Ayres had notice of the deed from Johnson to Gray when he became a creditor, there is an end to his case. It may, however, be important to consider the effect of notice to him at a subsequent period. Does the statute extend to every class of creditors, or are such only as have acquired some character of lien recognized by law as within its protection? There may be cases in our court, without the question having been specially adverted to, which have gone upon the doctrine of all creditors being within the law, though if so, we cannot at present call them to recollection. In *Bennett v. Cocks*, 15 Tex. 67, there was a levy of execution upon personal property, and a claim interposed to try the right of property. The court guardedly say: "It is manifest that throughout the proceedings of the court below the defendant was regarded as a creditor in the sense of the statute." Again: "If the defendant be a creditor within the meaning and scope of this provision (and as such he was considered, and the rights of the parties were adjudicated upon this hypothesis), the only question," etc. But we presume there can be but little doubt either in principle or authority in saying that only such creditors as have secured some character of lien upon the land before notice of the unrecorded deed are within the protection of the statute. The creditor cannot object to the sale of the property by the debtor before his lien has attached to it. Such sale, if the title is registered, is conclusive upon the creditor. Why shall he complain if the same effect is given to notice to him of the preceding sale before he has secured a lien upon the property? The only consequence to him of the failure to record the deed in such case is the additional opportunity which has been afforded him of subjecting the property to his debt, by fixing his lien upon it between the time of sale and his getting notice of it. It is sometimes said that creditors should be protected unless they had notice at the time credit was given, because the credit is extended upon the faith of the debtor's owning the property, if the title is then standing in his name. But this argument, if it is good for anything, proves too much. If the principle was sound, it would follow from it that the creditor's right to satisfaction of his debt out of the property owned by the debtor at the time credit is given him is superior to the claims of those subsequently dealing with him. The unrecorded deed is good between the parties; the grantee then has dealt with the grantor, and paid the consideration for the

land upon the faith of the effectuality of his title, and that it will not be swept from him by liabilities contracted by the grantor; why, then, does he not occupy as favorable a position as the general creditor? If he does, and we think it cannot be doubted, the record of his deed or notice to the creditor, before any specific right of the latter has attached to the land, should operate for his effectual security: *Daniel v. Sorrells*, 9 Ala. 436.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

ADMISSIBILITY OF PAROL EVIDENCE TO CONTRADICT SHERIFF'S RETURN: See *Pratt v. Phillips*, 60 Am. Dec. 162; *Newton v. State Bank*, 58 Id. 363, and cases cited in the note 370. The return of an officer is generally conclusive upon the parties to the record when collaterally called in question: *Folsom v. Carli*, 80 Id. 429, and note 432; *Nall v. Granger*, 77 Id. 462, and note 466; *McDonald v. Leewright*, 77 Id. 631; *Johnson v. Stone*, 77 Id. 706. But a sheriff may be called to prove that a recital in his return was made by mistake or inadvertence, though in the absence of fraud or mistake his testimony is not admissible to vary his return: *King v. Russell*, 40 Tex. 131, citing the principal case.

COMPETENCY OF WITNESS TO TESTIFY TO CHARACTER OF ANOTHER WITNESS for truth and veracity: See *Crabtree v. Hagenbaugh*, 79 Am. Dec. 324; *Gilliam v. State*, 73 Id. 161; note to *Allen v. State*, 73 Id. 773-775; the rule in Texas: 73 Id. 773.

PROPER FOUNDATION MUST BE LAID BEFORE INTRODUCING EVIDENCE OF CONTRADICTORY STATEMENTS: *Bobo v. Bryson*, 76 Am. Dec. 406; note to *Allen v. State*, 73 Id. 762-767, where this subject is fully treated.

IMPEACHING WITNESS BY PROOF OF HIS GENERAL MORAL CHARACTER. See *Long v. Morrison*, 77 Am. Dec. 72, and note 77. There is a diversity of opinion upon this point in the American courts. In some of the states the inquiry is restricted to the general reputation of the witness for veracity, and in others the inquiry involves the whole moral character of the witness: *Gilliam v. State*, 73 Id. 162, and note citing prior cases. See also the note to *Allen v. State*, 73 Id. 771. In *Fletcher v. State*, 49 Ind. 133, it is held that in a criminal case a witness cannot be impeached or sustained by proof of general moral character, and the principal case is cited as authority.

MOTION FOR CONTINUANCE IS ADDRESSED TO DISCRETION OF COURT: Note to *Stevenson v. Sherwood*, 74 Am. Dec. 141, 142, treating this subject at length.

RELEASE OF WITNESS'S INTEREST RENDERS HIM COMPETENT: *National Fire Ins. Co. v. Crane*, 77 Am. Dec. 289, and note 295.

IRREGULARITIES IN SHERIFF'S SALE RENDER SALE NOT VOID, BUT VOIDABLE ONLY; and a *bona fide* purchaser will take a good title unaffected by such irregularities: *Sowles and Wife v. Harvey*, 83 Am. Dec. 315, and note citing prior cases 316. So a sheriff's deed cannot be collaterally impeached for any irregularity in his proceedings or in the process under which he acts. In such case, a judgment, execution, levy, and sheriff's deed are all that need be shown: *Ware v. Bradford*, 36 Id. 427; *Newton v. State Bank*, 58 Id. 363, and note 370. The principal case is cited to this effect in *Boggess v. Howard*, 40 Tex. 158. So though the judgment be voidable, a purchaser at the sale may

acquire a good title: *Crawans v. Wilson*, 35 Id. 56, citing the principal case. But if the officer has either willfully or negligently proceeded to sell in violation of instructions, and as a result property is sacrificed, the parties are not without remedy. By motion in the court from which the execution issued, with notice to the purchaser, the sale may be, for good cause, set aside: *Owen v. City of Navasota*, 44 Id. 522, citing the principal case.

SPECIAL MATTERS OF DEFENSE MAY BE SPECIALLY PLEADED in an action of trespass to try title: *Hunt v. Turner*, 60 Am. Dec. 167, and note 171. The plea of not guilty in actions of trespass to try title goes directly to the points in dispute under the evidence, and throws upon the plaintiff the burden of proving everything in relation to these points that is necessary to maintain his suit and entitle him to recover: *Stroud v. Springfield*, 28 Tex. 673; *Singleton v. Hill*, 43 Id. 590. And where the evidence shows that the plaintiff claims land which is in possession of the defendants, and they deny that it is the same land as that described in the plaintiff's petition, the burden lies on the plaintiff to identify the land by proof: *Stroud v. Springfield*, 28 Id. 673. Under the plea of not guilty in this action, the defendant may set up any matter of defense except limitation, or that which involves affirmative equitable relief, both of which must be specially pleaded: *Williams v. Barnett*, 52 Id. 132. And so such equitable relief as avoiding a sheriff's deed for irregularities in the sale cannot be granted except under special plea: *Rippetoe v. Dwyer*, 49 Id. 507. The foregoing cases cite the principal case.

JUDGMENT CREDITORS PURCHASING AT THEIR OWN SALE are not *bona fide* purchasers without notice: *Pettingill v. Morse*, 74 Am. Dec. 747, and note 749; *Stroud v. Casey*, 78 Id. 556. The principal case is cited to this effect in *Farley v. McAllister*, 39 Tex. 603. Thus a purchaser of land at a sheriff's sale, who bought for the purpose of securing a pre-existing judgment in his own favor, and who paid for the land by a credit of his bid upon the judgment, is not a *bona fide* purchaser for value, in legal contemplation, inasmuch as he parts with no consideration on the faith of his purchase: *Orme v. Roberts*, 33 Id. 773. So a purchaser at execution sale, who pays the amount of his bid by crediting the judgment foreclosing a mortgage which is owned by his ward, is not a purchaser for value: *Delespine v. Campbell*, 52 Id. 12. In *Wallace & Co. v. Campbell*, 54 Id. 91, however, it is held that a judgment creditor who purchases at an execution sale, and has the amount of his bid credited on the execution, may be considered a *bona fide* purchaser. But the transfer of a negotiable instrument in consideration of a pre-existing debt is in the usual course of business, and is for a valuable consideration, and the principal case is not applicable to this doctrine: *Blum v. Loggins*, 53 Id. 137. The foregoing cases cite the principal case.

EFFECT OF UNRECORDED DEED UPON PURCHASERS AT SHERIFF'S SALE. — A purchaser at a sheriff's sale is a purchaser within the recording acts: *Draper v. Bryson*, 69 Am. Dec. 483, and note 484; but if the deed is recorded in the interval between the execution sale and the conveyance by the sheriff, it supersedes the sheriff's deed: *Leger v. Doyle*, 70 Id. 240, and note 246. In *Grace v. Wade*, 45 Tex. 529, 531, the distinction noted in the principal case between the protection given by the registration laws to creditors and purchasers is adverted to, and the court say: "We adhere to and sustain the doctrine to be deduced from the case of *Ayres v. Duprey*, that one who purchases at sheriff's sale may claim protection under the statute as a purchaser, even when the judgment creditor himself is not, as creditor, within its protection, and *vice versa*. While he cannot bring himself within its provisions in the character of a purchaser, he, or others subrogated to his rights, may

be entitled to its protection as a creditor." In *Price v. Cole*, 35 Tex. 471, it was held that a purchaser at an execution sale, who has notice on the day of the sale of an outstanding mortgage, cannot be regarded as an innocent purchaser; but this case was overruled in *Grace v. Ward*, *supra*. A bona fide purchaser without notice from an heir or administrator takes a good title notwithstanding a prior unrecorded deed from the ancestor or intestate: *Taylor v. Harrison*, 47 Id. 460. The creditor cannot object to the sale of the property by the debtor before his lien has attached to it: *Barrett v. Barrett*, 31 Id. 351. The foregoing cases cite the principal case.

JUDGMENT LIEN ON LAND OF DEBTOR is subject to every equity which existed against the land in the hands of the judgment debtor at the time of the rendition of the judgment; and courts of equity will protect such equities against the legal lien, and will limit that lien to the actual interest which the judgment debtor has in the estate: *Blankenship v. Douglass*, 28 Tex. 225; S. C., 82 Am. Dec. 608, and note 612, 613. In *Stroud v. Oberthier*, 35 Tex. 178, it is said that there is no conflict between *Blankenship v. Douglass*, *supra*, and the principal case. And in *Grace v. Wade*, 45 Id. 531, cited *supra*, the court cordially approves of this doctrine, except so far as it may differ from the principle therein maintained and from the rule of the principal case.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

FARMERS' AND MECHANICS' BANK v. HUMPHREY.

[33 VERMONT, 554.]

RIGHT OF HOLDER OF PROMISSORY NOTE TO SUE THEREON. — A promissory note made for the purpose of raising money, or of being exchanged for money, though made payable to a particular person or corporation, and with the expectation that it will be discounted by the payee, may be discounted by any other person; and the party who advances the consideration may hold the note as a valid consideration for the money, even against sureties, and may use the name of the payee to enforce payment by suit, by the payee's consent, either express or implied.

ASSIGNEE OF DEBT MAY BRING ACTION FOR IT IN ASSIGNOR'S NAME, even against his consent and without his knowledge, if such use of his name is necessary to enforce payment of the debt; but on application of the nominal plaintiff in such case, indemnity against costs would be required, and in default thereof the proceedings might be set aside or stayed.

ASSUMPSIT on a promissory note signed by the defendants, and payable to the plaintiff twenty days after date. Upon the facts appearing in the case, which are sufficiently set forth in the opinion, the court rendered judgment for the amount of the note against both of the defendants, to which decision the defendant Allen excepted.

George F. Edmunds, for the defendant Allen.

E. R. Hard, for the plaintiff.

By Court, **KELLOGG, J.** In several recent cases it has been settled by this court that a promissory note made for the purpose of raising money, or of being exchanged for money, though made payable to a particular person or corporation,

and with the expectation that it will be discounted by the payee, may be discounted by any other person; and that the party who advances the consideration may hold the note as a valid security for the money, even against sureties, and may use the name of the payee to enforce payment by suit, by the payee's consent, either express or implied: *Keith v. Goodwin*, 31 Vt. 268 [73 Am. Dec. 345]; *Bank of Montpelier v. Joyner*, 33 Id. 481; *Bank of Middlebury v. Bingham*, 33 Id. 621; *Bank of Newbury v. Richards*, 35 Id. 281. These cases were decided upon a full discussion and consideration of the rule of decision adopted by the court, and the rule itself is quite as firmly established as any legal principle connected with the law of the subject.

Humphrey was the principal in the note in the present case, and Allen was his surety. When Allen signed the note it was agreed between him and Humphrey that before it should be used Humphrey should procure it to be signed by one Noble, a responsible person, as co-surety, and that the note should be used at the bank to which it was made payable, "and not otherwise." Humphrey, in violation of this agreement, sold and delivered the note to Silas Whitcomb, who advanced to Humphrey the full amount of it in cash, acting in entire good faith, and without any notice of the agreement between Allen and Humphrey. Does this agreement in respect to obtaining another surety, and to the use which Humphrey should make of the note, vary or affect the rights which Whitcomb acquired by the purchase of the note? The note upon its face was complete and perfect, and it was in the hands of a party who was apparently entitled to deal with it; and its tenor, coupled with his possession of it, fairly imported that it was made for the purpose of being exchanged for money. If Humphrey had taken the note to the bank, and it had been there discounted, it would have been no defense to Allen that Humphrey had agreed with him not to use the note without procuring another surety upon it, unless the officers or directors of the bank had notice of the agreement at the time of discounting it.

This was expressly held in the case of *Passumpsic Bank v. Goss*, 31 Vt. 315; and that case illustrates a well-known legal principle, that where one of two innocent parties must suffer by the fraud of a third person, he who by trusting such third person enabled him to perpetrate the fraud must bear the loss. If the note was on its face a complete and perfected instrument, Whitcomb would, in the absence of any notice or

information of the agreement between Humphrey and Allen, have had the same right to purchase this note of Humphrey that he would have had to purchase it of the bank if it had been discounted for Humphrey by the bank. If Whitcomb exchanged his money for the note in good faith, his equities would be precisely the same whether he made the exchange with Humphrey or with the bank, and the apparent object for which the note was executed would be secured by the exchange with whomsoever it might be made. It could make no difference to Allen as a surety on the note whether the note should be discounted by Whitcomb in the first instance, or be discounted by the bank, and then transferred by the bank to Whitcomb for value. If the note was purchased by Whitcomb for a full consideration and in good faith while current, we think that he is entitled to enforce every legal right arising upon it which the bank could have asserted if it had discounted the note under the same conditions. He hereby became the real holder and party in interest, and the delivery of the note to him was an effectual delivery of it as well against the surety as against the principal: *Bank of Middlebury v. Bingham*, 33 Id. 634; *Bank of Newbury v. Richards*, 35 Id. 281.

It is claimed by the surety that even if this note should be considered as perfected and completed for use when it was purchased by Whitcomb, no action could be maintained to enforce payment upon it without the consent of the bank. It is conceded, in making this objection, that with such consent the action is maintainable; and some expressions used in cases decided in this court seem to imply that such consent, either express or implied, is necessary: *Bank of Burlington v. Beach*, 1 Aiken, 62; *Bank of Middlebury v. Bingham*, 33 Vt. 633. But the liability of the makers of the note accrued on its purchase by Whitcomb, and on the delivery of the note to him, and it is not dependent upon the subsequent assent of the bank. If there was any foundation for this objection, it could be set up to defeat the action as well by Humphrey as by Allen; but we do not think that either are entitled to raise any question of this character. It is a familiar rule of practice that an assignee of a debt may bring an action for it in the assignor's name, even against his consent and without his knowledge, if such use of his name is necessary to enforce payment of the debt. And yet, on his application, an indemnity against costs would be required, or the proceedings might be set aside or stayed. Where an attorney brought an action

for a wife in her husband's name, for a trespass in entering her house and taking her goods (she living apart from her husband), without authority from the latter, the court refused to stay the proceedings, although the husband joined the defendant in the application: *Chambers v. Donaldson*, 9 East, 471; but the proceedings in such a case would be ordered to be stayed until an indemnity against costs, to the satisfaction of the court, was given to the husband: *Morgan v. Thomas*, 2 Car. & M. 388. So where a *cestui que trust* brings an action in the name of his trustee, or in the case of joint tenants or joint contractors, or in other cases where a person is obliged to use another's name in an action, the proceedings will not be stayed upon the application of the trustee, etc., excepting temporarily, until he be indemnified against costs. But where the interference of the court would prejudice the real party in interest they may decline to interfere, especially where the attorney who prosecutes the action is a responsible person: 1 Chitty's Archb. Pr., 9th ed., 74; 2 Id. 1300, 1301. The note upon which this suit was brought, not being negotiable, could be sued only in the name of the bank; and we regard the real holder of that note as having the right to make use of the name of the bank in any necessary suit upon it. The right of the bank to interfere by refusing its assent to the prosecution of the suit in its name ought not to be recognized except upon the ground of some possible liability for costs arising from the suit, against which an indemnity ought to be provided; but the bank in this case seeks for no indemnity against costs, and the refusal of its consent to the prosecution of this suit in its name must be presumed to rest upon other reasons. If under existing circumstances this question could not be raised by the bank, there is still less reason for its consideration when raised by the defendants. It could not be claimed that if the bank had originally discounted this note and then sold it to Whitcomb, it could refuse the use of its name in a suit upon the note, if such a suit became necessary; and we do not see how the case is varied by the use of the name of the bank in this note without its knowledge. If Whitcomb had a right to purchase the note, we find no difficulty in conceding to him the right to use the name of the bank to enforce all the legal remedies upon it to which the bank itself would have been entitled if it had originally discounted the note.

Judgment of the county court for the plaintiff affirmed.

RIGHT OF ASSIGNEE OF NOTE TO MAINTAIN ACTION THEREON in assignor's name: See *Tybbetts v. Gerrish*, 57 Am. Dec. 307, and note 310.

ASSIGNEE OF DEBT, EVIDENCED BY LOST NOTE, MAY SUE IN HIS OWN NAME: *Long v. Constant*, 61 Am. Dec. 559.

RIGHT OF ASSIGNEE OF NOTE TO RECOVER THEREON: See *Goodrich v. Reynolds*, 83 Am. Dec. 240; *Foy v. Blackstone*, 83 Id. 246.

FLANAGAN v. HOYT.

[86 VERMONT, 565.]

ACTS OF DEPUTY ARE NOT TO BE REGARDED AS ACTS OF SHERIFF, in the sense of either agency or identity, but rather in the sense of official relation and of responsibility cast by law upon the sheriff for the acts of his deputy; that is, for what the deputy does, the sheriff is made responsible the same as if he had officially done the same thing.

RECEPTOR'S LIABILITY TO SHERIFF FOR PROPERTY TAKEN AND SOLD BY DEPUTY. — Property attached by a sheriff, and receipted, and left by the receptor in the defendant's possession, was, before judgment, levied upon and sold by the deputy on an execution against the defendant, without the knowledge or consent of the sheriff. *Held*, that upon judgment being recovered in the first suit and execution issued, the receptor was liable to the sheriff in an action for the property.

TROVER. The parties mutually agreed to a statement of facts, sufficiently appearing in the opinion, on which judgment was rendered for the defendant, and the plaintiff excepted.

E. R. Hard, for the plaintiff.

Levi Underwood, for the defendant.

By Court, BARRETT, J. Flanagan, as sheriff, attached the horses of Danforth on a writ against him; whereupon he and the defendant receipted the property in the ordinary manner, jointly and severally agreeing to keep it free of charge, and return it to the plaintiff on demand. After this, and before judgment in the suit on which the horses had been so attached, Livock, a deputy of the plaintiff, on an execution against Danforth, levied upon and sold the same horses without the knowledge or consent of either the plaintiff or defendant, said horses being in Danforth's possession. Judgment was duly obtained in said first suit, execution thereon was duly taken out and delivered to the plaintiff as sheriff, and the property was duly demanded of Danforth and the defendant by him; but it was not then or ever returned to him.

The property, being found in Danforth's possession, was

subject to be levied on the execution that Livock held, notwithstanding the prior attachment of it; and being so levied and sold, the receiptors must be liable to answer upon their receipt for the property, unless the act of Livock is to be regarded as the act of the plaintiff in such a sense as to render his taking of the property upon said execution as taken by the sheriff.

It is claimed that all official acts by the deputy are to be regarded as done by the sheriff, to the same intent, and to every legal effect, as if done by the sheriff himself, — in other words, that the deputy is but the agent or instrument by which the sheriff acts, and has no independent *status* and functions. We are mindful of what has been held and said in *Johnson v. Edson*, 2 Aiken, 299; *Davis v. Miller*, 1 Vt. 9; *Bliss v. Stevens*, 4 Id. 88; and *Ayer v. Jameson*, 9 Id. 363; and though no practical inconvenience or injury would seem likely to result from the view therein taken and expressed, as to the relation existing between the sheriff and his deputy, if confined to cases of a similar kind, it still seems to us that it would have been as well, even in those cases, to have adopted a different view, and one that could have been practically acted upon in all cases without incongruity, and without resulting in embarrassment or injury in any.

Without undertaking to overrule the view expressed in those cases, as applied and acted upon in them, we think the truer and more legitimate view is, that while in a certain sense the acts of the deputy are to be regarded as the acts of the sheriff, yet not in the sense of either agency or identity, but rather in the sense of official relation and of responsibility cast by law upon the sheriff for the acts of his deputy, not in the sense that what the deputy does is done by the sheriff, but that for what he does the sheriff is made responsible, the same as if he had officially done the same thing.

The statute and the court have always accorded to deputy sheriffs a distinct official existence, and cast upon them personal duties in their official character, — duties which they personally must perform without reference or regard to the source whence they derive their official existence, or to the relation of responsibility which the sheriff sustains to them.

Having been invested with official existence by the appointment of the sheriff, while that continues, deputy sheriffs have personally just as distinct and independent functions in the line of official duty as the sheriff himself; and the idea of

identity with the sheriff, or agency for him, does not legitimately arise in the lawful performance of those duties. It is only in case the deputy commits some breach of official duty that the idea of identity is suggested by the provisions of the statute, and that does not necessarily extend beyond the relation of responsibility which the sheriff is under for such acts.

If a deputy has taken property on a process, it is well understood that the same property may be further charged by delivering to him another writ, without any form or ceremony to be enacted by him in relation to such property, and so on, by the delivery to him of successive writs creating successive liens. But it would hardly be claimed that the mere delivery of a writ to the sheriff by some other creditor of the owner of the property would charge a lien by attachment upon that property as against a creditor who should subsequently deliver a writ to the deputy who was holding the property under such prior attachments. And still such must be the result of carrying this idea of identity to the extent claimed by the defendant in this case. Many cases might be put which would equally illustrate the practical as well as the legal official individuality and independence of the deputy sheriff.

The case of *Shaw v. Baldwin*, 33 Vt. 447, was decided in the county court upon the idea of the identity of the sheriff and his deputy, which is expressed and adopted in the cases above referred to; and that the taking of the piano by Bliss, as a deputy sheriff, on the writ of replevin, was a taking by the sheriff, Baldwin; and so it constituted no defense to the sheriff against his liability for not holding it upon the execution which he had previously levied, and upon which he was holding the property for sale. This court ignored that idea, and held the defendant excused.

In the present case, it is conceded that the act of the deputy in taking and selling the property on the execution that was delivered to him for that purpose was lawful in every respect; that he was but discharging a duty to the creditor which the law imposed upon him, and was doing with the property only what it was the lawful right of the creditor, through him as an officer of the law, to have done. The deputy had no right to decline to receive and execute said execution: Gen. Stats., c. 12, secs. 20, 21.

The property in Danforth's possession was subject, by the rules of law, to be levied upon by that creditor for the satisfaction of his judgment. And in this respect the defendant has no

cause to claim immunity, for he had voluntarily permitted the property, after having obtained its control by receipting for it to the plaintiff, to become subject to such levy by permitting it to go into Danforth's possession.

The statute above cited impresses a pretty distinct individuality upon the official *status* and character of a deputy sheriff in providing, in the disjunctive, that "any sheriff or deputy sheriff who shall willfully refuse or neglect, etc., shall pay a fine not exceeding one hundred dollars, and shall pay to the party aggrieved all damages thereby sustained, with costs."

In our judgment, the doctrine of the identity of the sheriff with his deputies, or that they are merely his servants and agents, ought not to be carried to the extent of holding the act of Livock, in levying said execution, to be the act of the plaintiff, to the intent that its effect upon the plaintiff's right to recover upon the receipt is the same as if the plaintiff had, personally, received and levied said execution upon said property. The legitimate result of so holding would be to place sheriffs and their deputies in a position that would compel them, for self-preservation, to refuse to part with the possession of property attached by them upon the offer of good and sufficient receipts, or compel sheriffs to have no deputies.

The present case places the subject in a strong light. The plaintiff was bound to keep and have the property attached by him, to respond the judgment in the suit. He surrendered the possession upon receiving a responsible receipt for it, according to long-practiced usage, fully warranted and sanctioned by law. The receiptors held and managed the property in their own way, and thereby subjected it to be taken by another creditor. Without any fault of the plaintiff, and without his knowledge, it was so taken and disposed of in a manner provided by the law.

His deputy, Livock, committed no official default in taking and disposing of the property upon the execution placed in his hands. If the plaintiff cannot be permitted to hold his receiptors, he must respond for the property without any resource for indemnity; for his deputy would not be answerable to him, having only done his duty enjoined by the law. Such a result can be justified only upon inexorable requirements of law.

This is but one of a series of cases that are likely to occur of a similar character, situated as sheriffs and deputies are in different and remote localities, and having no knowledge of the

processes which each may respectively have for service, or of what may have been done under them.

On the whole, we feel warranted in holding, and in this case, upon the law as we understand it, feel compelled to hold, that the taking of the property by Livock does not affect the right of the plaintiff and the liability of the defendant in this suit.

Upon the stipulation which constitutes the case, we do not understand that any question can be made as to the propriety of the form of action. If, in any form upon the facts stated, the plaintiff would be entitled to recover, we understand that he is to have judgment in this action for the sum agreed.

The *pro forma* judgment of the county court is reversed, and judgment rendered for the plaintiff for the sum agreed, with interest from April 19, 1862.

LIABILITY OF SHERIFF FOR ACTS OF DEPUTY: See *Whitney v. Butterfield*, 73 Am. Dec. 584; *State v. Moore*, 61 Id. 563, and note 565.

HOTCHKISS v. LADD.

[86 VERMONT, 508.]

DECLARATION IS NOT DEMURRABLE FOR NOT ALLEGING CONTRACT TO BE IN WRITING, if the facts alleged show a contract that would be binding if evidenced by a writing.

OBJECTION THAT PLEA ONLY AMOUNTS TO GENERAL ISSUE can only be taken by a special demurrer.

DEFENSE OF STATUTE OF FRAUDS MAY BE SHOWN UNDER GENERAL ISSUE, or pleaded specially, at the option of the defendant.

TO PLEA OF STATUTE OF FRAUDS ALLEGING THAT PROMISES MENTIONED WERE SPECIAL PROMISES to pay the debt of a person named, a replication denying that the promises were for the debt of such person is a good answer, without the words, or any other person. The traverse is as broad as the issue offered.

PLEADING — INSUFFICIENT REPLICATION. — A plea of the statute of limitations alleged that the causes of action did not, nor did either of them, accrue within six years, etc. A replication thereto alleging that the said causes of action, or some of them, did accrue within six years, etc., was held to be defective in not saying which accrued within six years.

ASSUMPSIT. Sufficiency of the pleadings. The opinion states the case.

H. R. Beardsley, for the plaintiff.

H. B. Smith and G. F. Edmunds, for the defendant.

By Court, POLAND, C. J. To the plaintiff's declaration the defendant pleaded the statute of limitations and the statute of frauds, to both which pleas the plaintiff replied, and to these replications Ladd demurred.

The defendant, Ladd, claims, not only that the plaintiff's replications are insufficient, but that the plaintiff's declaration is also defective, so as to be reached by the demurrer.

Two objections are made to the declaration: 1. That it states no sufficient consideration to support the promise declared on; 2. That the promise is within the statute of frauds.

Whether either of these objections is well founded, or not, depends mainly upon the construction to be given to the declaration. It is exceedingly difficult from the declaration to determine the real character of the transaction between the parties, and its allegations are nearly repugnant to each other.

It alleges, in substance, that Hotchkiss, Swan, and Bates were partners, and as such partners owned a stock of goods.

That Ladd and Warner formed a partnership between themselves for mercantile business, and agreed between themselves that Warner should purchase this stock of goods for the use and benefit of the partnership, but should execute his own note for them, and that such note should constitute a joint liability against the defendants. That Warner, by the direction and concurrence of Ladd, did purchase the goods of Hotchkiss, Swan, and Bates, for the benefit of himself and Ladd, that the goods were sold and conveyed to the defendants, and that Warner executed his notes to Swan and Bates in payment for the goods. The declaration then alleges "that on the same day said notes, with the knowledge and consent of the said Ladd and Warner, were delivered to the plaintiff in payment for said goods, who then held, and now holds, the same as his own property absolutely, and thereupon the said goods were delivered by the plaintiff to said defendants, in consideration whereof, and especially in consideration of the acceptance of said notes by the plaintiff as security for the payment of such goods so purchased by the said Warner as aforesaid, for the joint benefit of the defendants, and in consideration of the transfer and delivery of the same by the plaintiff to the defendants, for which transfer and delivery said notes were given as aforesaid,—they, the said defendants, did then and there jointly promise and agree with the plaintiff to pay him the said sums specified in said notes

respectively, as they should severally fall due and become payable."

The defendant claims that the true construction and meaning of the declaration is, that the plaintiff's firm sold the goods to Warner, and took his notes in payment for the same, and that Ladd verbally promised to pay Warner's notes upon no other consideration than that upon which the notes were themselves based.

If this be the meaning, it is a clear case of a collateral promise within the statute of frauds, and doubtful as to consideration, even if the promise were in writing.

The plaintiff claims that the purchase of the goods was really for the joint benefit of both defendants, and that the allegation as to the purchase of the goods of the plaintiff and his partners, and giving the notes of Warner in payment, is to be regarded merely as a statement of a contract or agreement for a sale of the goods, not perfected by a delivery of them, and that upon the further arrangement between the plaintiff and his partners that the notes should become the sole property of the plaintiff, known and assented to by the defendants, the sale was perfected between the plaintiff and the defendants jointly, the plaintiff to take the notes of Warner as security merely, and not in payment, and that the goods were delivered to the defendants jointly upon their joint promise to pay the price of them, as specified in Warner's notes. This interpretation makes it a clear case of an original undertaking by Ladd, and upon the most ample consideration. With some hesitation we have concluded that the declaration may bear this interpretation, and that it may be supported, even conceding that the promise alleged was merely a verbal one.

The declaration, however, need not allege the promise to be in writing, and if the facts alleged show a contract that would be binding if evidenced by a writing, the declaration is not demurrable because it is not stated to be in writing: Brown on Statute of Frauds, 488, 489, and notes; 1 Saund. 211, note 2, 276, and notes. The same point has been decided by this court in a case not yet reported.

No question is made but that the plea of the statute of limitations is in proper form, and is a good answer to the declaration. But the plaintiff claims that the plea of the statute of frauds is not a good answer: 1. Because it amounts to the general issue; 2. Because no issue can be taken upon it, and that it is a legal absurdity and anomaly.

A sufficient answer to the first objection, that the plea only amounts to the general issue, is that such objection can only be taken by a special demurrer: 1 Ch. Pl. 527, 528.

The other ground of objection to this plea is supported by the authority of *Doe dem. Beanland v. Hirst*, 11 Price, 475, where such a plea was held bad, and Baron Wood, who gave the opinion, denounces such pleas as unheard of and anomalous in the law. His whole argument is based upon the inconveniences which would follow by requiring the plaintiff to set out in his replication the written contract, which might have to be drawn from a lengthy correspondence, or from several different writings. The opinion is supported by no authority whatever, and it is just to say that it is only in recent days that the court of exchequer has come to be regarded as a court of high authority in the law, even in England. Its claim to consideration was very much less even in Baron Wood's day than at the present. On the other hand, it is laid down by Mr. Chitty that the defense of the statute of frauds (like infancy and other defenses which admit the making of the contract, but avoid it on some legal ground) may be shown under the general issue or pleaded specially, at the option of the defendant: 1 Ch. Pl. 480; and in a note he cites *Read v. Nash*, 1 Wils. 305; *Maggs v. Ames*, 1 Moore & P. 294; *Saunders v. Wakefield*, 4 Barn. & Ald. 595.

In the same note it is said that such a plea was held good by the House of Lords: *King v. Westwood*, 2 Dow & C. 21.

The American editor also cites *Gardner v. Webber*, 17 Pick. 407, and *Myers v. Morse*, 15 Johns. 425, as sustaining the same doctrine.

Mr. Chitty gives a form for such a plea (3 Ch. Pl. 909), and in a note he says such plea was held good on demurrer in *Maggs v. Ames*, 1 Moore & P. 294. This decision was several years subsequent to the case of *Lilley v. Hewitt*, 11 Price, 494, in the exchequer, and must be regarded as overruling it.

If the plea states what is a good defense to the action, if true, and is pleaded in proper form, it is impossible for me to see what objection can be made to it, except that it amounts to the general issue only, and, as has already been said, this is only ground for special demurrer.

The defendant claimed that the plaintiff's replications to his pleas are both defective. The plea of the statute of frauds alleges that the promises mentioned were special promises to answer for the debt of another, to wit, William K. Warner, and that there was no memorandum in writing signed, etc.

The replication alleges that the promises, etc., "were not special promises, nor were any of them for the debt of the said William K. Warner," etc.

The objection is, that the replication does not say they were not promises to pay the debt of Warner, or any other person. It is said that, though the defendant's promise was not for the debt of William K. Warner, it might be for that of some other person, and therefore it is too narrow a traverse.

But the plea, as we think, had confined it to Warner's debt, and that the traverse is as broad as the issue offered, and that the replication is a good answer to the plea. The plea of the statute of limitations alleges that the causes of action mentioned in the declaration did not, nor did either of them, accrue within six years, etc.

The replication alleges that said causes of action, or some of them, did accrue within six years, etc. The objection is, that the replication is wholly uncertain, and that the defendant could not know to which of several causes of action the replication was intended to apply.

The plaintiff, to support this replication, relies wholly upon what is found in Lawes's Pleading in Assumpsit, 548, where it is said: "If the defendant pleads that the several causes of action did not, nor did either of them, accrue within six years, it seems that the plaintiff may reply that they, or some of them, accrued within that time, as it is a direct affirmation of the latter words of the plea, and is therefore a good issue."

The only case cited in support of this statement is *Scott v. Charleton*, 2 Lutw. 1605. The cases in Lutwyche have long ceased to be regarded as much authority, if they ever were so, and the authority of the doctrine must rest mainly upon the adoption of it by Mr. Lawes, whose book (though now but little in use) I have found generally very accurate in its statement of the law.

But it seems to us that this cannot be regarded as a direct affirmation of the negative words of the plea.

The substance of the plea is, that none of the causes of action arose within six years, that they were all barred by the statute. The plaintiff replies that some of them, without saying which, accrued within six years.

It was doubtless admissible for the plaintiff to confine his replication to a portion only of his claim, but he should have specified which, in order that the defendant might know what to meet by his evidence.

It is said that the declaration disclosed but one cause of action, that there was but one promise, and though that was to pay different sums at different times, the statute would not begin to run till the first sum fell due.

But we do not so understand the law, and even in the case of a note payable by installments, the statute commences running on the several installments as they fall due: *Grafton Bank v. Doe*, 19 Vt. 463 [47 Am. Dec. 697].

So far as the statute of limitations was concerned, the declaration set out several different causes of action, some of which might be barred by the statutes and others not.

One of the cardinal rules of pleading which applies to pleadings in every stage is that requiring certainty. Mr. Chitty says: "Another essential quality of a replication is certainty; and it is said that more is requisite in a replication than a declaration, though certainty to a common intent is in general sufficient. Where the replication is only to a part of the plea, the part alluded to should be ascertained with certainty; as if in *assumpsit* on several promises, the defendant has pleaded infancy, and the plaintiff reply that part of the goods were for necessary food and part for clothes, it is said to be insufficient if he do not show what part was for the one and what part for the others": 1 Ch. Pl. 648, 649.

The illustration given by Mr. Chitty seems to apply forcibly to this replication, and we feel compelled to hold it defective. The judgment of the county court is reversed, and judgment that the replication to the plea of the statute of limitations is insufficient.

WHEN STATUTE OF FRAUDS MUST BE PLEADED: *Wentworth v. Wentworth*, 72 Am. Dec. 97, and note 102; *Osborne v. Endicott*, 65 Id. 498; *Tarleton v. Vietes*, 41 Id. 193.

WHEN STATUTE OF FRAUDS MAY BE AVAILED OF ON HEARING, though not set up in answer: *Wynn v. Garland*, 68 Am. Dec. 190.

STATUTE OF FRAUDS MAY BE TAKEN ADVANTAGE OF BY DEMURRER, where the objection appears on the face of the complaint: *Switzer v. Skiles*, 44 Am. Dec. 723; and see *Box v. Stanford*, 51 Id. 142.

COMPLAINT UPON CONTRACT WITHIN STATUTE OF FRAUDS NEED NOT AVER THAT IT WAS IN WRITING: *State v. Woram*, 40 Am. Dec. 378; *James v. Fulcrod*, 55 Id. 743.

GENERAL REPLICATION WAIVES BENEFIT OF STATUTE OF FRAUDS as a defense against an agreement set up in the answer: *Tarleton v. Vietes*, 41 Am. Dec. 193.

STATUTE OF FRAUDS, WHEN AND HOW PLEADED. — At common law, a declaration on an agreement within the statute of frauds need not allege that

the agreement is in writing. The writing is matter of proof, and not of allegation: *Price v. Weaver*, 13 Gray, 272; *Mullaly v. Holden*, 123 Mass. 583; *Elliott v. Jenness*, 111 Id. 29; *Walker v. Richards*, 39 N. H. 259; *Cranston v. Smith*, 6 R. I. 231; *Piercy v. Adams*, 22 Ga. 109; *Carroway v. Anderson*, 1 Humph. 61; *Burkham v. Mastin*, 54 Ala. 122; *Young v. Austen*, L. R. 4 C. P. 553; *Birch v. Bellamy*, 12 Mod. 540; *Pascal v. Richards*, 50 L. J. Ch. Div. 337. And a declaration is not demurrable, which sets forth an agreement within the statute of frauds, although it does not allege that the agreement was in writing: *Price v. Weaver*, 13 Gray, 272, and authorities cited in the principal case. Thus a mere promise to pay the debt of a third person, without any new or superadded consideration moving to the promisor from the plaintiff, is within the statute of frauds, and to be binding must be in writing and must state the consideration; but it need not be alleged in the declaration that the promise is in writing, and failure to so allege does not render the declaration demurrable: *Ecker v. Bohn*, 45 Md. 278. When such contract or agreement is declared upon generally, without stating whether it is in writing or not, it will be presumed to be in writing so far as the pleadings are concerned: *Cross v. Everts*, 28 Tex. 523; *Lessing v. Cunningham*, 55 Id. 231, 235. The distinction made by the authorities is, that when the contract would be good at common law, without writing, it is not necessary, in suing on it, to aver that it was written, although unless it is, a statute may declare it invalid. But if a statute creates the liability, or authorized the contract, and rendered a writing essential, then, in suing on it, the declaration must aver that it is in writing: *Brown v. Adams*, 1 Stew. 51; *Burkham v. Mastin*, 54 Ala. 122, 126; and see *Young Men's C. A. v. Dubach*, 82 Mo. 475, 479.

It is likewise the rule in code pleading, that in an action upon a contract required by the statute of frauds to be in writing, it need not be alleged in the complaint or petition that it is in writing. For the purposes of the pleading this will be presumed: *Livingston v. Smith*, 14 How. Pr. 490; *Hilliard v. Austin*, 17 Barb. 141; *Marston v. Swett*, 66 N. Y. 206; *Lamb v. Starr*, Deady, 353; *Pettit v. Hamlyn*, 43 Wis. 314; *Hedges v. Strong*, 3 Or. 18; *Gardner v. Armstrong*, 31 Mo. 535; *Sweetland v. Barrett*, 4 Mont. 217; *Young Men's C. A. v. Dubach*, 82 Mo. 475; *Green v. Coos Bay Wagon Road Co.*, Cir. Ct. Or. 23 Fed. Rep. 71. Thus if a complaint avers that a contract was made for the sale of land, it is not necessary to aver that it was in writing, for the presumption is that it was in writing: *McDonald v. Mission View Homestead Assoc.*, 51 Cal. 210; *Vassault v. Edwards*, 43 Id. 458. So, although a statute requires a contract for the payment of gold coin to be in writing to make it valid, yet the complaint need not allege that such agreement was in writing: *Taylor v. Patterson*, 5 Or. 121; *Russell v. Swift*, 5 Id. 233. But the rule is otherwise in some of the code states. Thus, under the Code of Indiana, if a contract in writing is the foundation of an action, a copy of the contract must be filed with the complaint, and if it is not alleged to be in writing, and no such copy is filed, the presumption arises that the contract is not in writing, and if the contract be such as is required by the statute of frauds to be in writing, the objection may be taken by demurrer: *Harper v. Miller*, 27 Ind. 277; *King v. Enterprise Ins. Co.*, 45 Id. 43; and see *Goodrich v. Johnson*, 66 Id. 258; *Suman v. Springate*, 67 Id. 115; *Foreman v. Beckwith*, 73 Id. 515; *Budd v. Kraus*, 79 Id. 137. So the code of Iowa expressly makes it a ground of demurrer that the petition fails to show that a contract was in writing when the law requires it to be so evidenced: Iowa Rev. Code (1880), sec. 2648, subd. 6. In Kentucky, a petition which fails to show a promise in

writing made by one, for the undertaking of another, is insufficient to sustain a judgment, though taken by default: *Smith v. Fah*, 15 B. Mon. 443. And it appears to be settled in this country, at law as well as in equity, that where it clearly appears on the face of a bill or declaration that an agreement within the statute of frauds is in parol, the objection can be taken by demurrer: See *Macey v. Okildress*, 2 Tenn. Ch. 438; *Walker v. Locke*, 5 Cush. 90; *Lawrence v. Chase*, 54 Me. 196; *Linn Boyd etc. Co. v. Terrill*, 13 Bush, 463; *Thomas v. Hammond*, 47 Tex. 42; *Howard v. Brower*, 37 Ohio St. 402; *Randall v. Howard*, 2 Black, 585; *Slack v. Black*, 109 Mass. 496; *Ahrend v. Odiorne*, 118 Id. 261; though it is intimated in England that a defense founded on the statute cannot be raised by demurrer: *Calling v. King*, L. R. 5 Ch. Div. 660. And see the following American decisions: *Sherwood v. Saxton*, 63 Mo. 78; *Osborne v. Endicott*, 6 Cal. 149; S. C., 65 Am. Dec. 498; *Thurman v. Stevens*, 2 Duer, 609.

The subject of pleading the statute of frauds is generally discussed with reference to the sufficiency of pleas and answers, as it is generally the defendant who asks the aid of the statute. And the general rule at common law is declared to be, that one who would avoid the obligation of a parol contract by reason of the statute of frauds must set up the statute and rely upon it by some proper pleading, and if this be not done he thereby impliedly waives the objection that the contract was not in writing: *Montgomery v. Edwards*, 46 Vt. 151; *Newton v. Swazey*, 8 N. H. 9; *Lawrence v. Chase*, 54 Me. 196; *McClure v. Otrich*, Sup. Ct. Ill., 8 N. E. Rep. 784; *Lear v. Chouteau*, 23 Ill. 39; *O. & W. Coal Co. v. Liddell*, 69 Id. 639; *Finnican v. Kendig*, 109 Id. 198; *Irwin v. Dyke*, 114 Id. 302, 305. So by statute in Massachusetts: *Middlesex Co. v. Osgood*, 4 Gray, 447. The reason given for the rule is, that a contract within the statute of frauds is not absolutely void, but only voidable, at the election of the party against whom it is sought to be enforced. He may avail himself of it or not, as he sees fit, and if he intends to insist on it he should say so, clearly and distinctly, at the outset: *Beard v. Converse*, 84 Ill. 512; *Lawrence v. Chase*, 54 Me. 196. But an exception is made to the rule where the plaintiff declares only on the common counts and seeks to recover for the agreed price of realty or any other consideration for a contract within the statute of frauds, in which case it is competent to rely on that statute as a defense without pleading it, and advantage may be taken of it, on the evidence, under the general issue, since it cannot be known, before the evidence is heard, that any contract within the statute will be proven or insisted upon: *Taylor v. Merrill*, 55 Ill. 52; *Meyers v. Schemp*, 67 Id. 469; *Durant v. Rogers*, 71 Id. 121; *Beard v. Converse*, 84 Id. 512; *Boston Duck Co. v. Dewey*, 6 Gray, 446; *Hunter v. Randall*, 62 Me. 423, 426. In equity pleading, if a defendant sought to be charged upon a contract within the statute of frauds admits the contract and does not claim the benefit of the statute, he is considered as waiving its protection: See *Coxine v. Graham*, 2 Paige, 177; *Ontario Bank v. Root*, 3 Id. 478; *Patterson v. Ware*, 10 Ala. 444; *Albert v. Winn*, 5 Md. 66; *Battell v. Matot*, Sup. Ct. Vt., 5 Atlantic Rep. 479; S. C., 58 Vt. 271; *Cooth v. Jackson*, 6 Ves. 12; *Ridgway v. Wharton*, 3 De Gex, M. & G. 677; *Heys v. Astley*, 4 De Gex, J. & S. 34; *Homfray v. Fothergill*, L. R. 1 Eq. Cas. 567. But even when the answer admits the parol agreement, if it insists, by way of defense, upon the protection of the statute, the defense must prevail as a competent bar: *Luckett v. Williamson*, 37 Mo. 388; *Burt v. Wilson*, 28 Cal. 682; *Rowe v. Teed*, 15 Ves. 375; *Kine v. Balse*, 2 Ball & B. 343. But a failure to expressly claim the benefit of the statute upon a verbal contract is held not to be confined to the existing issues, but is perma-

ment in effect, and cannot afterwards be set up as a defense to a cross-bill to enforce the contract: *Battell v. Matot*, Sup. Ct. Vt., 5 Atlantic Rep. 479; S. C., 58 Vt. 271.

In pleading the statute of frauds under the code system of pleading, the rules which prevail in courts of equity have been generally recognized and applied. Thus, if a contract, valid in form, but not in writing, as required by the statute, is set out in the complaint or petition, and it does not there appear that it was not in writing, unless the contract is denied in the answer or alleged to be void because not in writing, the statute furnishes no defense: *Marston v. Sweett*, 66 N. Y. 206; *Gwynn v. McCauley*, 32 Ark. 97; *Burt v. Wilson*, 28 Cal. 632. If the defendant admits the contract as substantially set out, and the statute of frauds is not pleaded or insisted upon in the answer, the defendant is deemed to have renounced the benefit of it: *Duffy v. O'Donovan*, 46 N. Y. 226; *Alger v. Johnson*, 4 Hun, 412; *Connor v. Hingtgen*, 19 Neb. 472; S. C., 27 N. W. Rep. 443. And some of the cases have held that the statute of frauds is new matter of defense, and must be pleaded by him who would insist upon it, and if not, it is waived: *Gardner v. Armstrong*, 31 Mo. 535; *Donaldson v. Newman*, 9 Mo. App. 235; *Thurnian v. Stevens*, 2 Duer, 609. Thus, in an action for the specific performance of a contract to sell lands, it was held that the defendant must plead the defense that the contract was not in writing, and therefore void under the statute of frauds, in his answer, otherwise the defense is waived: *Maybes v. Moore*, Sup. Ct. Mo., 2 S. W. Rep. 471. It is further held that the facts relied upon in defense under the statute should be set out: *Bean v. Valle*, 2 Mo. 126; *Dinkel v. Gundelfinger*, 35 Id. 172. The general rule in code pleading, however, is, that the statute of frauds may be relied upon as a defense as well under a general denial as under any other answer: *Amburger v. Marvin*, 4 E. D. Smith, 393; *Blanck v. Little*, 10 Rep. 151 (N. Y. Com. Pl.); *McMillen v. Terrell*, 23 Ind. 163; *Suman v. Springate*, 67 Id. 115; *Dixon v. Duke*, 85 Id. 434, 438; *Birchell v. Neaster*, 36 Ohio St. 331; *Wiswell v. Tefft*, 5 Kan. 263. The rule is thus stated: "If a parol agreement within the statute of frauds be alleged in the complaint, but denied in the answer, it is not necessary for the defendant to insist on the statute as a bar; or if the contract be admitted in the answer and the statute is set up as a defense, the defendant is entitled to its benefit": *Bonham v. Craig*, 80 N. C. 224; and see *Campbell v. Campbell*, 2 Jones Eq. 364; *Sain v. Duin*, 6 Id. 195. And it is held that if an oral contract only is alleged, and the answer denies it, the defendant may object on the trial to any evidence of the alleged contract which is not in writing: *Morrison v. Baker*, 81 N. C. 76; *Allen v. Chambers*, 4 Ired. Eq. 125; *Mahana v. Blunt*, 20 Iowa, 142. But if the statute be not pleaded in the court below, nor objection made to evidence on the trial, because the contract is within the statute, it cannot be considered upon appeal: *Holt v. Brown*, 63 Iowa, 319; S. C., 19 N. W. Rep. 235; *Kraft v. Greathouse*, 1 Idaho, 254. It has been held that where a defense is founded on an agreement within the statute of frauds, the answer must show that such agreement was in writing, a distinction being made between a complaint or petition and answer in this respect: *Reinheimer v. Carter*, 31 Ohio St. 579, 586; *Chicago etc. Coal Co. v. Liddell*, 69 Ill. 639. But a plea setting forth a contract within the statute is held to be good on demurrer, although it does not aver that the contract is in writing, it not appearing in the plea that it was not in writing: *Tucker v. Edwards*, 7 Col. 209; S. C., 3 Pac. Rep. 233.

As it respects the form of a plea or answer of the statute of frauds, it should expressly aver that the contract was not in writing as required by the statute, and should answer all the other facts not expressly denied: *Bean v. Valle*,

2 Mo. 126; *Dinkel v. Gundelfinger*, 35 Id. 172; *Chambers v. Massey*, 7 Ired. Eq. 286; *Miller v. Cotten*, 5 Ga. 341. And merely stating in the answer that the contract is void in law, and that the defendant is not bound to perform the same, is not sufficient to enable him to avail himself of the statute, or to put the plaintiff on proof of a contract in writing: *Vaspell v. Woodward*, 2 Sand. Ch. 143; and see *Champlin v. Parish*, 11 Paige, 405; *Baker v. Hollobaugh*, 15 Ark. 322; *Edelin v. Clarkson*, 3 B. Mon. 31.

MUSSEY v. PERKINS.

[36 VERMONT, 600.]

GENERAL PROPERTY IN THING ATTACHED, PENDING SUIT IN WHICH ATTACHMENT ISSUED, remains in the owner, with no abatement of right except what is operated by the attachment.

OWNER OF WOOD ATTACHED MAY MAINTAIN TROVER FOR ITS CONVERSION by a third person pending the attachment, the property having been left in the actual possession of the owner.

TROVER for 180 cords of wood. A judgment was rendered in favor of the plaintiff, and the defendant excepted. The opinion states the material facts.

Edgerton and Paul, for the defendant.

Dewey and Joyce, for the plaintiff.

By Court, BARRETT, J. The plaintiff owned the wood in question. It was attached by leaving a copy in the town clerk's office, without other act by the attaching officer. While the suit was pending on which it had been attached, the defendant, though expressly forbidden by the plaintiff, drew away the wood and disposed of it.

It is claimed by the defendant that the attachment so operated upon the custody and right of possession of the property as to preclude the plaintiff from a right to maintain this action.

It is unquestionable that the sheriff had such a right of possession that he might have maintained an action for the conversion of the property, and as is said in *Lowry v. Walker*, 4 Vt. 81, "he alone can maintain an action for it for the benefit of the attaching creditor."

By the attachment the sheriff acquires a special property by way of right of lien with a right of possession pending the suit on which it was attached, terminating if the suit fails with the failure of the suit,—continuing if the suit results in a judgment for the plaintiff, to enable it to be made to respond such judgment in due course of lawful proceeding. But pending

the suit the general property remains in the owner, with no abatement of right except what is operated by the attachment: *Johnson v. Edson*, 2 Aiken, 299; *Blodgett v. Adams*, 24 Vt. 23. In the present case the property was left in fact in the possession of the plaintiff, subject, indeed, to the supervening right of the officer, and so subject that the plaintiff would have been liable to the officer for a conversion of the property in case the pending lien had been perfected by a judgment and a charging in execution.

But this does not so operate to countervail the plaintiff's right in respect to the property as general owner in actual possession, as to preclude him from a right of action against a third person for a destruction of the property. In the event of a failure of the suit on which the property had been attached, his full right to it would be restored, and no one would question his right to maintain an action then for the conversion by a wrong-doer pending the attachment. The most, then, that could be claimed in this case is, that the plaintiff's right to bring a suit was suspended during the pendency of the attachment.

But we think this is not so. The general ownership remaining all the while in the plaintiff, with actual possession, we think sufficient to entitle him to maintain this action for the taking and using up of the property. All that the defendant could ask was accorded in this case by the order that execution should not issue till the lien of the attachment should have been ended. In the case of *Blodgett v. Adams*, 24 Vt. 23, the true principles and their application are clearly stated and shown, and therein the right of the owner of property under attachment to interfere to secure its safety and preservation is distinctly recognized.

It is an elementary principle that either the general or special owner of goods may maintain trover for their conversion, subject, however, to the rule that a judgment in favor of the one will bar a suit by the other: 2 Sand. 47 c; 1 Ch. Pl. 62.

This rule, we apprehended, would not exist and be applicable in all cases, but only in those where the ground of action and recovery covered the same kind and extent of damage.

However this may be, the defendant has full indemnity against peri. by a suit in behalf of the sheriff by the aforesaid order of the court as to issuing of execution on this judgment.

The judgment is affirmed.

TITLE TO PROPERTY, GENERAL OR SPECIAL, AND RIGHT TO IMMEDIATE POSSESSION, is necessary to sustain trover: *Baxter v. Bush*, 70 Am. Dec. 429, and note 432; *Davidson v. Waldron*, 83 Id. 206.

TROVER WILL NOT LIE AGAINST ATTACHING OFFICER FOR NEGLIGENCE in not taking proper care of the property attached: *Abbott v. Kimball*, 47 Am. Dec. 708.

OWNER OF LAND OUT OF POSSESSION MAY MAINTAIN TROVER for timber cut thereon by one not in actual possession of the premises: *Wright v. Guier*, 36 Am. Dec. 108.

LEVY OF EXECUTION WILL SUPPORT ACTION OF TROVER: *Davidson v. Waldron*, 83 Am. Dec. 206, and note 215.

HUBBARD v. DUBOIS.

[37 VERMONT, 94.]

FACT THAT DEFENDANT APPEARED BY ATTORNEY, AS SHOWN BY JUDGMENT RECORD, cannot be traversed or denied by him; nor will he be permitted to show that such attorney had no authority to so appear, and the judgment will effectually conclude him.

APPEARANCE FOR THOSE DEFENDANTS ONLY UPON WHOM SERVICE HAD BEEN MADE is shown by a judgment record from which it appears that the writ issued against four, but was served on two only, and proceeding as follows: "And at the same term came the said defendants, by their attorney," naming him, and then continuing to state the proceedings to a final judgment against the defendants.

COPIES OF AUDITOR'S REPORT, AND OF RULE, CITATION, AND OFFICER'S RETURN THEREON, are admissible in evidence in an action upon a judgment rendered upon the report of an auditor, as aiding to explain the meaning of the record when doubtful, but not to contradict the record.

DEBT upon a judgment alleged to have been obtained against four defendants. The defendant, Dubois, pleaded that said judgment was rendered without any service of the writ upon him, and that the record did not show that he appeared by attorney, etc. At the trial, the plaintiff introduced in evidence a copy of the judgment record, the material parts of which appear in the opinion. The defendant, Dubois, offered in evidence certain copies of papers, also set out in the opinion, which were admitted by the court, and judgment having been rendered in his favor, the plaintiff excepted.

John Rowell, for the plaintiff.

A. P. Hunton, for the defendant.

By Court, POLAND, C. J. It is now well-established law that where the record of a judgment shows that the defendant appeared by attorney, such fact cannot be traversed or denied by him, nor will he be permitted to show that such attorney

had no authority to so appear, and the judgment will effectually conclude him: *St. Albans v. Bush*, 4 Vt. 58 [23 Am. Dec. 246]; *Newcomb v. Peck*, 17 Id. 302 [44 Am. Dec. 340].

In this case, the sole question is upon the proper construction of the record given in evidence; does it show that the defendant Dubois did appear by attorney? The record incorporates at length the writ and return of service thereon. From this it appears that the writ issued against Lamson, Hobart, Newell, and Dubois as defendants, but service was made only on Lamson and Hobart. Immediately following the recital of the writ and return of service the record proceeds as follows: "And at the same term come the said defendants by their attorney, J. P. Kidder," etc., and proceeds to state the proceedings to a final judgment against the defendants. The defendants are not named in the record, after the recital or copy of the writ and return. Now, what is the fair and reasonable interpretation of the word "defendants," taken in connection with all that appears in the record? Does it mean all the persons named in the writ as defendants, or only those upon whom service had been made, and who had been legally brought before the court? The court had no proper jurisdiction over those upon whom its process had not been served, and could render no judgment against them, unless they voluntarily waived their right to be legally notified of the suit, and submitted to the jurisdiction of the court, by appearing in the cause either in person or by attorney. The whole power of the court over them rests upon their appearance, and therefore it seems just to hold that the record should show clearly and unequivocally that they did appear, and should not be assumed upon any doubtful or questionable construction of language. The word "defendants" is just as properly applicable to two defendants as to four.

The language follows the writ and return, which shows that two of the persons against whom the writ issued had been properly notified and were properly before the court, and the others had not been notified and were not before the court at all, unless they had volunteered to come in. In this condition of things it seems to us that the more natural and reasonable interpretation is that the appearance was for the former only, and not for the latter. At any rate, it is too doubtful and uncertain to furnish that positive and conclusive bar upon those defendants not served, which is created by the record of an appearance in a suit.

The case of *Blood v. Crandall*, 28 Vt. 396, is conceded to be the strongest authority for the plaintiff which our reports contain. In that case the record showed that the writ was served on one defendant named in the writ, and not upon the other. The record stated that "the defendants came by A B, their attorney, and the defendants confessed that they ought to account, etc., and it was considered by the court that the plaintiff recover of the defendants," etc. It was decided by the court that this record show an appearance for both defendants,—as well the one not served as the one who was. But the use of the plural "defendants" throughout the entire record was not consistent with the fact of the appearance being for one only, and there being but two persons named as defendants in the entire proceeding, the fair and reasonable intendment was that the word "defendants" referred to both, and that the appearance was for both. The point seems to have received but slight consideration in that case, but we are not prepared to say it was not correctly decided. But the case is so clearly distinguishable from this, that giving it its utmost force it will not warrant a holding that this record shows unequivocally and clearly an appearance for those defendants upon whom the writ had not been served.

It appears from the exceptions that on the trial the defendant, Dubois, introduced a duly certified copy of the rule to the auditor, the citation from the auditor to summon the parties to appear before him, and the service of it, and also the auditor's report. These papers were objected to by the plaintiff, but admitted in evidence by the court. But the court say that in making their decision, they made it solely upon the record which the plaintiff had introduced, and without reference to the copies of the papers introduced by the defendant. But these papers are referred to in the exceptions, and sent up as a part of the case. We do not see why they were not admissible. Properly they should be made a part of the record, as they were a part of the proceedings which resulted in the judgment, and though they were not incorporated into the record, still, when duly authenticated, we do not see why they were not admissible, as a part of it, or in connection with it.

The more usual course is not to incorporate the original writ and return into the record, but to refer to it as on file; but the constant practice is to send with the record, and as a part of it, an exemplification of the writ and return.

It may be true that these should not be allowed to contradict the record proper, but they may be considered in connection with it, and as aiding to explain the meaning of the record itself, when that is doubtful or equivocal.

In these papers Lamson and Hobart alone are named as defendants in the suit, making it clear that the appearance of Mr. Kidder was for them alone, and not for Newell and Dubois.

But without this, and upon the record alone introduced by the plaintiff, we think the court correctly decided.

Judgment affirmed.

AUTHORITY OF ATTORNEY TO APPEAR IS PRESUMED: *Bunton v. Lyford*, 75 Am. Dec. 144, and note 146, fully discussing the question whether judgment obtained by the unauthorized appearance of attorney is void, voidable, or conclusive.

BEARD v. MURPHY.

[87 VERMONT, 99.]

OWNER OF LAND IS ENTITLED TO HAVE IT SUPPORTED IN ITS NATURAL CONDITION by the land of his adjoining proprietor, and if the latter removes such support to the injury of the former he is liable for the damages so occasioned.

OWNER OF LAND CANNOT CLAIM SUPPORT OF ADJOINING SOIL for any artificial structure he may erect upon his land, and which increases the lateral pressure.

PARTY CLAIMING THAT ERROR HAS BEEN COMMITTED UPON TRIAL against his legal rights must make it appear affirmatively upon the record.

ONE MAY PREVENT IN PEACEABLE WAY WRONGFUL VIOLATIONS OF HIS RIGHTS by another, and may use the necessary means to that end, although such means may work incidental harm to the wrong-doer.

OWNER OF LAND MAY ERECT OBSTRUCTION THEREON TO PREVENT INFLUX OF FOUL WATER from adjoining premises wrongfully permitted by the owner of the latter, even if it results in turning back the surface water which flows naturally from such premises.

ACTION on the case. The plaintiff and defendant were adjoining land-owners, and the action was for damages alleged to have been caused by an excavation made by the defendant upon his land adjacent to that of the plaintiff. Buildings had been erected on the plaintiff's land previous to the grievance complained of, and the plaintiff claimed damages for the injury to his wall and buildings occasioned by the digging of the defendant upon his adjoining land to lay the foundation for his building. The plaintiff's evidence tended to show that the defendant began to dig without notice to the plaintiff, and that of the defendant tended to show that he gave such notice.

It further appeared that the surface water flowed naturally from the plaintiff's land onto the defendant's land, and that the plaintiff and his tenants were in the habit of throwing filthy water from their kitchen, which flowed down on the defendant's land, to the injury of his well. To prevent this injury the defendant put up a barrier so as to turn off such filthy water from his well, and thereby caused the surface water to turn off into a well of the plaintiff, to his injury. The trial resulted in a verdict for the defendant, and the plaintiff excepted. Other facts and the substance of the charge to the jury appear in the opinion.

Dickey and Clark, for the plaintiff.

R. McK. Ormsby, for the defendant.

By Court, POLAND, C. J. It is now well settled that the owner of land is entitled to have it supported and protected in its natural condition by the land of his adjoining proprietor, and that if such adjoining owner remove such natural support, whereby the soil of the former is disturbed or falls away, he is legally liable for all damage so occasioned. And we are not prepared to say but that the plaintiff's counsel are quite right in saying that his liability in such case cannot be made to depend upon his mode of doing the act, or whether he acted prudently or negligently in reference to what would be the probable effect of his act upon his neighbor's land. This view is supported by the case of *Humphries v. Brogden*, 12 Q. B. 739, which is a very thoroughly considered case, and we are inclined to believe the current of decisions will be found in conformity with that, but we have not deemed it necessary to enter into any extended examination of the cases.

It is also equally well settled that the owner of land is not entitled to claim the support of the adjoining soil for any artificial structure he may erect upon his land which increases the lateral pressure, and that for any damages to such artificial structure caused by the removal of the natural support of the soil by such adjacent proprietor he is not liable unless he is guilty of carelessness and negligence in his manner of making the removal, or he fails to give prior notice thereof to the owner of the structure, so that he may take the necessary measures for the protection and preservation of his property from the consequences of such act: See *Richardson v. Vermont Central R. R. Co.*, 25 Vt. 465 [60 Am. Dec. 283], and cases cited.

The plaintiff concedes that the charge of the court to the jury was entirely correct, so far as related to any claim for damages for any disturbance or injury to his wall or buildings occasioned by the digging of the defendant upon his adjoining land to lay the foundation for his building. This really was the only substantial damage the plaintiff sustained by the defendant's act; if this can be said to be so, and it seems from the exceptions that this was really what the plaintiff sought to recover for upon the trial. But the exceptions say that the plaintiff's evidence tended to prove that in consequence of the digging by the defendant, the wall which supported the plaintiff's kitchen which stood upon the line settled a little, so that dirt ran out from under it upon the defendant's land, and some of the dirt which the plaintiff had piled or banked against his wall on his own land ran over the wall and fell upon the defendant's land. The plaintiff now complains that the jury were not put to find upon the evidence, whether if the plaintiff's land was in its natural condition, without any wall or buildings upon it, the defendant's act of excavating would not have caused the plaintiff's soil to be disturbed, and so that the plaintiff might be entitled to recover irrespective of any question of notice or of prudence and skill in the defendant's manner of making the excavation. But the case shows that the plaintiff had erected his wall upon the extreme verge of his land, and upon such wall had placed buildings. The real damage he was claiming to recover was the damage to his wall and buildings, and the fall of the earth from the plaintiff's land under or over his wall appears to have come out rather as part of his proof of the transaction by which the structures were damaged than as any distinct ground of claim of recovery.

The changes made in the natural condition of things, by the erection of the plaintiff's wall and buildings, were so great that it would be mere conjecture as to what effect this excavation would have produced if they had not been made.

It seems perfectly clear that the dirt which fell over the wall could not have so fallen if nothing artificial had been placed by the plaintiff on his land, because that earth itself was piled or banked against the wall, on the inside, and was itself an artificial burden on the natural soil. From what appears in the case, it does not appear that there was any fair ground of claim that if there had been no increase of the natural weight and pressure upon the soil, on the plaintiff's side of

the line, that what was done by the defendant on his land would have disturbed the plaintiffs. But this was, of course, a question for the jury to pass upon, if such a question had been made. But we fail to find in these exceptions that any such point was made by the plaintiff, or that the attention of the court was called to any such theory of claim, or instruction to the jury claimed on such basis. The request to charge the jury upon the damage to the soil is put upon the same ground as the damage to the wall and buildings,—that the excavation was made by the defendant without notice to the plaintiff. We cannot manufacture or imagine errors for the purpose of correcting them. The party claiming that an error has been committed upon the trial, against his legal rights, must make it appear affirmatively upon the record, and none is so made to appear in respect to this point.

The plaintiff also claims that the charge was erroneous as to the stopping of the surface water by the defendant, by putting up boards. The plaintiff claimed that if the surface water naturally falling on his land would run off upon the defendant's land, the defendant had no right to put up any obstruction to prevent its continuing to do so.

This the court granted, and charged to be the law.

The court also told the jury that if the plaintiff or his tenants persisted in emptying filthy water from the plaintiff's kitchen where it would run down on the defendant's land, and injure his well, the defendant might legally place an obstruction to prevent it. The plaintiff does not question the soundness of this proposition, and its eminent justice would commend it to every fair mind. But the court further told the jury that if such an obstruction as was actually necessary in order to prevent injury to the defendant, from the persistent and unlawful acts of the plaintiff or his tenants in casting filthy water on the defendant's premises, did have the effect to stop some of the surface water from running off the plaintiff's land upon that of the defendant, the defendant would be liable therefor.

This is complained of by the plaintiff. In his view the defendant must forego all right to protect himself from the plaintiff's unlawful act, and seek such redress as he could get by litigation, unless he could use the means of prevention in such manner as to work no incidental harm to the plaintiff. We know of no such rule of law or right. If the plaintiff or his tenants violated the defendant's rights by turning filthy

water on his premises and spoiling his well, the defendant had the right by law in a peaceable way to prevent it, and save himself from harm if he could, and to use the necessary means to that end.

If such means produced some incidental hurt or damage to the plaintiff, he has no right to complain. It cannot be made chargeable to the defendant, whose act was rightful; it is really caused by his own wrongful act, which made that of the defendant necessary.

The judgment is affirmed.

EASEMENT OF LATERAL SUPPORT, damages for infringing, etc.: *Charles v. Rankin*, 66 Am. Dec. 642, and note 647, where the subject is fully discussed; *McGuire v. Grant*, 67 Id. 49; *Foley v. Wyeth*, 79 Id. 771, and note 775; *Dowling v. Hennings*, 83 Id. 545.

LOWER ESTATE MUST RECEIVE NATURAL FLOW OF WATER from upper estate: *Hooper v. Wilkinson*, 77 Am. Dec. 194; *Barrow v. Landry*, 77 Id. 199; and obstruction to natural flow may be removed: *Overton v. Sawyer*, 62 Id. 170; and see *Delahoussaye v. Judice*, 71 Id. 521, and note 525; also *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; S. C., 6 Atlantic Rep. 453.

THE PRINCIPAL CASE IS CITED in *Cin. H. & D. R. R. Co. v. Ahr*, 2 Cin. Supr. Ct. 513, as embodying the principle "that where two parcels of land, belonging to different owners, lie adjacent to each other, and one parcel lies lower than the other, the lower one owes a servitude to the upper, to receive the water which naturally runs from it, provided the industry of man has not been used to create a servitude." The rule adopted in California is, "that when two parcels of land, belonging to different owners, are adjacent to each other, and one is lower than the other, and the surface water from the higher tract has been accustomed, by a natural flow, to pass off over the lower tract, the owner of the lower tract cannot obstruct this flow": *Ogburn v. Connor*, 46 Cal. 346; S. C., 13 Am. Rep. 213. But it is added, that this rule "has not been generally followed in the other states, except in so far as it applies to town or city lots," citing, among others, the principal case; and see *Wagner v. Long Island R. R. Co.*, 5 Thomp. & C. 166, note.

LITTLE v. SLEEPER.

[87 VERMONT, 105.]

IT IS NECESSARY TO VALIDITY OF LEVY OF EXECUTION ON REAL ESTATE that the execution and the officer's return thereon should be recorded in the proper office within the life of the execution and before the return.

EJECTMENT. The title of the defendant depended upon the validity of the levy of an execution issued upon the lands in controversy upon a judgment rendered in his favor. The plaintiff had a verdict, and the defendant excepted. The opinion states the material facts.

C. W. Clark, for the defendant.

R. McK. Ormsby, for the plaintiff.

By Court, **PIERPOINT, J.** The principal question in this case is as to the validity of the levy of the defendant's execution upon the land in controversy. The exceptions show that the officer levied the execution upon the land, took it with his return thereon to the town clerk's office, and the town clerk made a certificate upon it that he had received it for record, but did not then record it. The officer thereupon took the execution from the town clerk's office and returned it to the office of the justice who issued it, and the justice subsequently recorded it. The said officer afterwards, and within the life of the execution, took it from the office of the justice and carried it to the town clerk's office and left it there to be recorded. The town clerk put it on file and subsequently recorded it; but the jury have found, under the charge of the court, that the town clerk did not record it until after the return day had passed.

These facts present the simple question whether it is necessary to the validity of the levy of an execution that the execution and the officer's return thereon should be recorded in the town clerk's office within the life of the execution. The language of the statute is that "all executions extended and levied upon real estate, with the return of the officer thereon, being recorded in the office wherein deeds of such real estate are required by law to be recorded, and also returned into the office of the clerk of the court or justice from whom such execution issued, and there recorded, shall, as against the debtor," etc.

It has long been settled in this state that all that the statute requires the officer making a levy to do, or cause to be done, to make such levy valid, must be done, and the execution and his return thereon returned to the authority issuing it within the life of the execution. This principle is recognized in *Hall v. Hall*, 5 Vt. 304; *Downer v. Hazen*, 10 Id. 418; *Morton v. Edwin*, 19 Id. 77; *Russell v. Brooks*, 27 Id. 640; and *Perrin v. Reed*, 33 Id. 62.

Is the recording of the execution and proceedings thereon an act that the officer should cause to be done before he returns the execution? The language of the act clearly indicates that it is; the words "being recorded in the office wherein deeds of such real estate are by law required to be recorded,

and also returned into the office of the clerk of the court or justice," etc., will hardly admit of any other construction than that the record in the town clerk's office is to precede the return, and if so, then it must be the duty of the officer to cause it to be done, as there is no other person that has any authority in the matter. Again, the record in the town clerk's office must precede the return, as after the return the execution and the return thereon become a part of the files of the court, and should there remain and be recorded. The power of the officer over the execution is at an end. Neither he nor any other person has a right to take the execution from the files for the purpose of having it and the return thereon recorded in the town clerk's office, or for any other purpose.

It would seem to have been the intention of the legislature, in framing the several enactments on this subject, that when a levy is completed and the execution returned the records in the town clerk's office should show precisely what had been done changing or affecting the title, so that all might have notice thereof, either actual or constructive.

In *Perrin v. Reed*, 33 Vt. 62, this court held that it was not necessary that the execution and officer's return thereon should be recorded in the office of the clerk or magistrate who issued the execution, within the life of the execution, but the principle is fully recognized in that case, that the record in the town clerk's office is to be made within the life of the execution, and before the return thereof; and although this point did not arise in that case, the reasoning of the learned judge on the subject is sound and satisfactory. The distinction that exists between the recording of the proceeding in the town clerk's office and in the office of the court issuing execution is clearly presented; in the latter case the causing of the record to be made is no part of the duty of the officer; it must necessarily be made after the return of the execution, and as the officer has the entire life of the execution to make his return in, it follows that in some cases, if the record is made at all in the office from which it issued, it must be made after the life of the execution has expired. The statute indicates no time within which this record is to be made, but we think the statute, in the case of the record in the town clerk's office, as well as the nature and form of the whole proceeding, and the reason on which the requirement is based, all indicate most clearly that the record is to be made within the life of the

execution and before the return, and if not so made the levy is void.

Judgment of the county court affirmed.

WHEN LEVY ON LAND WILL BE VOID FOR UNCERTAINTY OF DESCRIPTION: *Porter v. Byrne*, 71 Am. Dec. 305, and note 308.

EFFECT OF ABSENCE OF OR IRREGULARITIES IN RETURN ON EXECUTION: *Hamblen v. Hamblen*, 69 Am. Dec. 358, and note 362; *Symonds v. Harris*, 81 Id. 553.

STATUTORY PROVISIONS AS TO LEVY ARE DIRECTORY GENERALLY, and not mandatory: *Smith v. Randall*, 65 Am. Dec. 475, and note 480.

TO CONSTITUTE VALID LEVY ON PERSONAL PROPERTY, the levy should be indorsed on the execution in its lifetime, and should be distinct and specific: *Davidson v. Waldron*, 83 Am. Dec. 206, and note 214.

McCRILLIS v. CARLTON.

[87-VERMONT, 139.]

VENDEE CANNOT RESCIND CONTRACT INDUCED BY FRAUD, AFTER DISPOSING OF PROPERTY, by offering to restore what he received for it, although he disposed of the property before the discovery of the fraud. His remedy is an action for damages, or a reduction from the contract price to the same extent, if that is yet unpaid.

ASSUMPSIT for goods sold and delivered. The plaintiff sold the defendant a quantity of butter, for which the former was to receive his pay, with interest, by a fixed date, and as much sooner as the latter should receive the money, from time to time, out of the proceeds of sales made by him. It appeared there was a loss on the butter from the contract price agreed on, which the defendant refused to pay, and the plaintiff claimed to recover this balance. The defendant claimed that the loss on the sale of the butter was all occasioned by the fraudulent representations of the plaintiff as to the state of the market or price of butter at the time of entering into the contract for its purchase. He also introduced evidence tending to prove that a portion of the butter was of inferior quality. Other facts, with the requests of the defendant to the court, and the charge in respect thereto, appear in the opinion. The verdict was in favor of the plaintiff.

Wing, Lund, and Taylor, for the defendant.

P. Dillingham, for the plaintiff.

By Court, POLAND, J. The exceptions taken to the leave given the plaintiff to file new counts is not now insisted on.

That part of the defense growing out of the alleged misrepresentation by the plaintiff of the quality of the butter sold is also disposed of, as no exception was taken to the instructions given the jury upon that branch of the defense.

The remaining questions grow out of the alleged false representations of the plaintiff as to the state of the market for butter in Boston at the time of the trade, and the future prospect of the market.

The court charged that the plaintiff was not bound to disclose to the defendant his knowledge of the state of the market; that in respect to that each party must look out for himself.

It is hardly claimed that in this respect the court committed any error, and in respect to the sale of marketable commodities, such has always been understood to be the rule, and seems to have been sanctioned by this court in *Paddock v. Strobridge*, 29 Vt. 470. The court did charge that if the plaintiff knowingly misrepresented the existing state of the market to the defendant, and that the defendant relied upon his representations, and was thereby deceived to his prejudice, it would not render the contract void so as to preclude any recovery, but would entitle the defendant to claim a deduction from the contract price to the extent of the damages he sustained by reason of such misrepresentation.

The main objection made by the defendant to this part of the charge is, that the court did not comply with his request, and charge that such fraudulent misrepresentation entitled him, at his election, to avoid the contract.

But the charge of the court, and their neglect to charge as requested, must be looked at in reference to the state of facts before the court. The principle is undoubted, that where a contract is induced by misrepresentation and fraud, the party who has been defrauded may, upon discovering the fraud, rescind the contract, and thereby relieve himself from obligation to perform it, although a mere breach of warranty without fraud would not entitle him to do so. But the difficulty in the present case is, that the facts were not such as to entitle the defendant to claim any such charge. The defendant never did rescind the contract, or offer to rescind it, and had before suit was brought actually disposed of the entire property purchased of the plaintiff, and put it wholly out of his power to rescind. In such case, the defendant, having put it out of his power to restore to the plaintiff what he has by virtue of the

contract, must rely upon the remedies which the law reserves for him, either by a separate action for the fraud, or by claiming a reduction from the contract price to the extent to which he has been a sufferer by the fraud.

It has been held in some cases, that although the purchaser may have made some partial change or disposition of the purchased article before discovering the fraud, this would not deprive him of the right to rescind, provided he was able to restore substantially what he received by the purchase, and offered to do so immediately on discovering the fraud. But no case has been brought to our attention, and we know of none, where it has ever been held that where the purchaser had wholly disposed of the purchased property, either for money or anything else, before discovering the fraud, that he could rescind by offering to restore what he had received for it. He has then received the full benefit of the contract, and the avails of his purchase, and if these were less than he had the right to expect, and the loss was occasioned by actionable fraud on the part of the vendor, the law furnishes an adequate remedy by an action for the damage, or by a deduction from the contract price to the same extent, if that is yet unpaid.

In the present case, the defendant claimed that the loss he suffered on the sale of the butter, between the price he agreed to pay the plaintiff for it and what he received in market for it, was all occasioned through the fraud of the plaintiff.

If his evidence established this, then, under the charge of the court the jury should have given the defendant a verdict, and the error by which the defendant suffered was not in the court, but in the jury, and is beyond our power to correct.

But the reasonable supposition is, that the evidence did not prove as much as the defendant claimed.

The court also charged that what the plaintiff said to the defendant as to the future prospect of the market for butter was necessarily, and upon its face, but the expression of opinion or judgment, and was not such a misrepresentation as would entitle the purchaser to avoid a sale, or maintain the action.

If the representation was of the existence of particular facts, in their nature calculated to affect the future state of the market, and were false, and known to be so by the seller, and the purchaser was thereby deceived and defrauded, I should think they amounted to an actionable fraud. But such does not appear to have been the representation of the plaintiff.

It did not appear but that the plaintiff honestly believed all he stated in relation to the prospective improvement of the market for butter; nor was there any evidence but that the plaintiff was advised by butter dealers as he represented to the defendant. Upon the state of evidence presented by the case, we think the court gave the defendant all legal opportunity to make his defense successful, so that he has nothing to complain of which is in our power to remedy.

Judgment affirmed.

SUBJECT OF RESCISSION OF CONTRACT is fully discussed in note to *Bryant v. Isburgh*, 74 Am. Dec. 657. That party rescinding must do equity, see *Nichols v. Michael*, 80 Id. 259, note 268.

AUSTIN v. BAILEY.

[87 VERMONT, 219.]

HEIR, UPON DEATH OF ANCESTOR, HAS VESTED INTEREST IN ESTATE, which he may immediately convey by deed, and his grantee holds the land, as the heir did, subject to the administrator's lien.

IN VERMONT, HEIR MAY MAINTAIN EJECTMENT when such period has elapsed after administration was granted upon the estate as is sufficient to raise the presumption that the time for payment of debts has expired, and the administrator's lien has been satisfied.

POSSESSION WILL NOT BE DEEMED TO BE WRONGFUL, and in the absence of all proof, will be attributed to a lawful origin.

TITLE ACQUIRED BY FIFTEEN YEARS' ADVERSE POSSESSION is as good as though by deed, and cannot pass by mere verbal surrender.

WHERE RIGHTS OF BOTH PARTIES STAND UPON MERE POSSESSION, not yet ripened into a perfect title, he who has the prior possession has the best right; but if he abandon and surrender it to the adverse party, he cannot afterward set it up.

EJECTMENT. The plaintiff claimed to have bid off the lot in controversy at a tax sale in 1845, and testified that he received a deed of it in 1846, and afterwards exercised acts of ownership over it; that in 1848, one Elisha Webster entered into possession, claiming to have paid the tax and to have a receipt therefor; and that he and Webster agreed that the latter should remain in possession the rest of the season, and if he did not produce a receipt he should quit, which he did in the fall without producing the receipt. He further testified that, after Webster left in 1848, he himself took possession, and exercised acts of ownership down to 1860, when he deeded the lot to one Amy, who entered thereon and resided until 1862, when he sold and reconveyed to the plaintiff; that

after Amy removed, the defendants entered, and have continued to hold possession. The plaintiff did not produce any deed of the lot, testifying that it was never recorded, and was burned in 1859, when his house was destroyed by fire. But he claimed that he had derived good title by an adverse possession from the fall of 1846 to the spring of 1862, when the defendants entered. The latter traced title to the lot from 1809 down to the conveyance to E. F. Bailey, one of the defendants, in 1862, and introduced evidence tending to prove that one Gamsby became the owner of the lot and entered thereon as early as 1823, and there resided until his death, about 1831 or 1832; that Solomon Heaton then became the owner, and occupied till his death in 1835, and that after his decease his widow and family occupied till 1839; and that Gamsby and the Heatons held uninterrupted possession for a period of more than fifteen years. It did not appear that any one was in actual occupancy after the Heatons till 1844 or 1845, when Elisha Webster entered under a deed from one Chandler, who was assignee of H. G. Heaton, son of Solomon Heaton. Alva Heaton, the last of the Heatons to hold title to the lot, and who conveyed to Elisha Webster in 1861, was a son of King Heaton, who died in 1854. It was shown that administration was granted upon King Heaton's estate in 1854, but it did not appear that his administrator had ever asserted any right or claim to the land. The deed of the land from Webster to one Congdon, dated 1861, and the deed from Congdon to the defendant E. F. Bailey, dated 1862, were introduced. Other facts appear in the opinion. The verdict was for the defendants.

G. N. Dale and J. Ross, for the defendants.

H. Heywood, for the plaintiff.

By Court, ALDIS, J. The heir, upon the death of the ancestor, has a vested interest in the estate, which he may immediately convey by deed: *Hubbard v. Ricart*, 3 Vt. 207 [23 Am. Dec. 198]; *Hyde v. Barney*, 17 Id. 280 [44 Am. Dec. 335]. The grantee by the deed gets the title of the heir and stands in his place. He holds the land as the heir did, subject to the lien (if any) of the administrator. To protect this lien, the statute provides (Gen. Stats., p. 391, sec. 14), that when an administrator shall be appointed and assume the trust no action of ejectment shall be maintained by any heir until,—
1. There shall be a decree of the probate assigning such

lands to such heir; or 2. The time allowed for paying debts shall have expired; or 3. The administrator shall voluntarily surrender possession to the heir.

In this case the title (as the jury must have found) became vested in the Heaton. King Heaton, who thus was the owner of a part of the land, died in 1854, leaving several heirs. One of them, Alva, deeded the land to Webster, under whom the defendant claims. The interest of the heir thus passed to the defendant.

The defendant, E. F. Bailey, being in possession, sets up his title derived from Alva Heaton. The plaintiff shows that King Heaton, the father of Alva, died in 1854, and that an administrator of his estate was appointed; but nothing further was shown, and it did not appear that the administrator had ever asserted any right or claim to the lot.

Upon this single fact, that administration of King Heaton's estate was granted in 1854, the plaintiff claims that the defendant cannot set up his title derived from Alva Heaton. This goes upon the ground that he cannot sue in ejectment, and if so, cannot defend in ejectment by setting up that title upon which he could not sue. Without stopping to consider whether this conclusion is legally derived from the premises, it is sufficient that we hold that upon the facts stated he would not be precluded from suing in ejectment.

1. The defendant, E. F. Bailey, was in possession of the premises when the plaintiff brought this suit. There is nothing to show that he was not in possession by the consent—"the voluntary surrender"—of the administrator. Possession will not be presumed to be wrongful; but on the contrary, in the absence of all proof, will be attributed to a lawful origin.

2. The statute provides (Gen. Stats., p. 404, sec. 29) that the time to be allowed by the probate court for the payment of debts shall not in the first instance exceed one year from the time of granting letters of administration. Without proof we cannot assume that the probate court either exceeded the law or extended the time.

Here nine years have passed since the granting of letters of administration, so it may well be presumed that the time allowed for paying debts has expired. The period to which the probate court can extend the time for paying debts may not exceed three years and six months: Gen. Stats., secs. 29-31.

In the case of *Hubbard v. Ricart*, 3 Vt. 207 [23 Am. Dec. 198], the court held that the grantees of the heirs could sue

in ejectment within two years after the granting of administration. There having been no interference by the administration, his lien was presumed satisfied after a lapse of two years. In that case, as in this, the party denying the right of the heir's grantee to the land was a stranger to the title. If it were the administrator or a creditor of the estate that denied the right of the heir, the court would perhaps have more hesitation in presuming the lien of the administrator satisfied.

2. The entry of Webster and his occupancy of the lot in 1848 was in his own right, and under a claim of title. It continued through the season, and excluded the plaintiff. This was clearly an interruption of the plaintiff's possession.

The adverse possession which gives title must be continuous for fifteen years.

It is urged that Webster's possession in 1848 was by agreement with the plaintiff, and virtually in subjection to the plaintiff's title. But the plaintiff's testimony, even, does not sustain this view. He says Webster claimed that he had paid the tax upon which the plaintiff claimed he had bid the lot off at the tax sale. Thus their claims were hostile. They then agreed that Webster should remain in possession the rest of the season, and if he did not produce his receipt for the payment of the tax he was to quit the premises at the end of the season. In the fall, he quit without producing the receipt.

This agreement and Webster's failure to produce the receipt (which upon this point we assume to have been as the plaintiff testified) shows that Webster's possession was without right, but not that it was in subjection to the plaintiff's title. There is no agreement to hold under the plaintiff, no payment of rent in any form, no recognition of his right; on the contrary, there is persistency in the hostile claim till the end of the season. During this period, the plaintiff was out of possession, and by his own agreement was to remain out till fall.

The court properly held that this interruption broke the continuity of the plaintiff's adverse possession, so that he could not tack his prior to his subsequent possession to make out the fifteen years.

3. If Gamsby and the Heaton's had acquired title by fifteen years of adverse possession, such title thereby became perfect, and was as good as a paper title by the record from the original proprietors. It was no longer a mere possessory right. It had ripened into a legal estate in fee in the land. This being so, it is quite obvious that such an estate, such a title, cannot pass by mere verbal surrender.

4. The ruling of the court, that Webster's prior possession of the lot for two or three years before the plaintiff's entry upon it would prevail over the defendant's subsequent possession for less than fifteen years, unless Webster gave up and abandoned his possession, stands upon a long-established principle of law. Where the rights of both parties stand upon mere possession not yet ripened into a perfect title, he who has the prior possession has the best right. The qualification of the rule, that if the party having the prior possession abandon and surrender it to the adverse party, he cannot afterwards set it up, was fully explained to the jury.

Judgment affirmed.

WHO MAY MAINTAIN EJECTMENT: See *Bird v. Lisbroe*, 70 Am. Dec. 617, and note 620; *Windus v. Christy*, 60 Id. 597; *McLaurin v. Salmons*, 52 Id. 563; *Thomas v. Orrell*, 44 Id. 58.

ADVERSE POSSESSION, TITLE BY: *Ford v. Wilson*, 72 Am. Dec. 137, and cases collected in note 142; *Carbrey v. Willis*, 83 Id. 688, and note 693.

FIRST POSSESSION GIVES BEST RIGHT AS BETWEEN INTRUDERS: *Green v. Kellum*, 62 Am. Dec. 332.

THE PRINCIPAL CASE IS CITED to the point that title acquired by fifteen years' adverse possession is as perfect for all purposes as though derived by deed, and no verbal transfer, surrender, or declaration of the person acquiring the title can have any effect upon it, in *Hodges v. Eddy*, 41 Vt. 488.

KEYES v. RINES.

[87 VERMONT, 260.]

STATUTORY VALUE OF HOMESTEAD IS EXEMPT FROM ATTACHMENT where, having been actually invested in land as a homestead, it is changed into money, or a right of action by process of law *in invitum*, and then kept separate as a homestead fund, and no intent is shown to apply it to other uses.

PROCEEDS OF SALE OF HOMESTEAD BELONG TO WIFE, AND CANNOT BE ATTACHED for her husband's debts, where she refuses to join in a deed of the homestead unless the avails are given to her, and the husband consents to her having them.

TRUSTEE process. The opinion states the case.

G. C. and G. W. Cahoon, for the plaintiff.

Cree and Davis, for trustee and claimant.

By Court, ALDIS, J. The plaintiff seeks to hold by trustee process the sum of four hundred dollars, as the property of Samuel Rines, the principal defendant. The trustee has given his note for the four hundred dollars to Louisa Rines,

the wife of Samuel Rines. The note, being payable to Mrs. Rines, is *prima facie* her property, and of course not liable for her husband's debts.

To rebut this presumption, and to show that it is really the money of Mr. Rines, the plaintiff shows these facts: Mr. and Mrs. Rines owned a homestead in New Hampshire. Mr. Rines being in debt, and the house and lot he owned being worth more than the five hundred dollars exempt as homestead, and being incapable of division, his creditors, pursuant to a statute of New Hampshire, sold the property at auction. By the New Hampshire law, the proceeds of the sale of the homestead part could not be paid to the husband without the consent of the wife, but (such consent wanting) should be deposited in a savings bank, where for one year it could remain free from attachment, and from which it could only be drawn upon the joint order of the husband and wife. If paid to the husband with the consent of the wife, or if paid to the wife by consent of the husband, the law is silent as to whether it would be exempt from his debts; but the spirit of the law would seem clearly to imply that the proceeds of the fund while kept by both husband and wife as a homestead fund — separate from other moneys and not applied to other uses — would be free from attachment upon the husband's debts.

We think the fair meaning of the New Hampshire statute is, that the homestead, when changed by process of law *in invitum* as to its owners into money, remains in its new form exempt from attachment so long as its owners keep it as such, a separate fund, and do not act indicating its diversion and abandonment from such special use to other purposes. In the case at bar the wife refused to join her husband in a deed to the purchaser, unless the proceeds should be paid to her. But upon the assurance that she could hold the money as safely as she could the homestead, and upon payment of the proceeds to her, she consented to join in the deed. The four hundred dollars was paid to her, by consent of the husband, and upon the condition and terms above indicated; and she has ever since kept the money in her own hands, free from all interference of her husband, — a separate fund, with the intent to invest it in a homestead. When her son-in-law, the trustee, purchased a farm for seventeen hundred dollars, it was agreed that one half of it should be deeded to Mrs. Rines, and for half of the purchase-money (\$850), Mrs. Rines was to pay in the four hundred dollars she so held, and her two

sons should make up the balance to the trustee. These two sons were in the state of Georgia, and by the breaking out of the rebellion have been prevented (as is said in the disclosure) from remitting the \$450 to their mother. But she paid the four hundred dollars to the trustee; and he, as a temporary arrangement, and waiting the completion of the bargain, gave her his note for the amount. And upon this arrangement, she and her husband and family, and her son-in-law, the trustee, moved on to the farm so bought, and have ever since resided there.

1. Let us consider the money merely as proceeds of the homestead, changed by process of law from land into money, kept by the wife as a homestead fund by the consent of the husband, — kept separate by her, and with the abiding intent to appropriate it solely for a homestead.

A clear distinction has been made in the decisions in this state between the proceeds of personal property exempt from attachment when such property has been voluntarily sold by the debtor, and when taken from him by proceedings against his will, and changed into money.

In the first case, the money or proceeds are held not to be exempt from his debts. The rule in such case is, as expressed by Judge Royce in *Edson v. Trask*, 22 Vt. 18: "The statutory exemptions of property in favor of debtors are uniformly limited to specific chattels, and do not extend to debts or pecuniary claims due the debtor." That was the case of a cook-stove exempt while in the debtor's hands, but the proceeds of it or the debt for it not exempt.

So "the tools of one's trade," and a last cow, when sold, have been held in their new form of debts due the debtor as not exempt: *Scott v. Bingham*, 27 Vt. 561.

But where the property has not been voluntarily sold by the debtor, but changed in its form by process of law and against his will, then the proceeds are still held to be protected by the statute. Otherwise the debtor would be deprived of all benefit of the statutory exemption. This doctrine is fully established in *Stebbins v. Peeler*, 29 Vt. 289. Chief Justice Redfield says: "Where this property is converted into a mere right of action by a proceeding wholly *in invitum*, such right of action and the money collected are also exempt from attachment, the same as the property itself." This principle is in harmony with the recent legislation of our state upon the homestead law, — our statute expressly providing for the pro-

tection of the proceeds of a homestead sold by process of law and for their investment under the order of the court.

The proceeds of the homestead here in question were protected for the benefit of the wife and children while they remained in New Hampshire. They were kept by the wife as a homestead fund,—the identity of the fund preserved as well as the intent to apply it to the specific use. By removal to Vermont they came to a state where the same protection was extended to property so situated. Is there any reason why such a fund of the poor debtor should not be so sequestered and secured to its humane object because the debtor comes from a sister state to reside among us, and brings the fund with him from a state whose laws protect it to the same extent as our own? We think not. Of course, neither a resident nor one who comes from abroad can, of their own will, set apart five hundred dollars, and say, "This is a homestead fund, and thereby exempt." But where that sum has been actually invested in land as a homestead, and changed into money or a right of action by process of law *in invitum*, and then kept separate,—not commingled with other moneys, and no intent shown to apply it to other uses,—we think the reason and spirit of the law require it to be held sacred to its original use and to be exempt from attachment.

2. In this case, too, we think the transaction, as disclosed in the commissioner's report, might well be held as establishing a title in the wife to the money.

She had an interest in it by law, and refused to join in the deed with the husband unless the avails were to be hers. Her intent was that it should be hers, and not her husband's; so that neither he nor his creditors could apply it to his debts. He consented. Her execution of the deed was a good consideration, at least in part. It was a relinquishment of her interest in land. If in part, also, it is to be deemed as a voluntary gift by the husband, this, too, may be justly upheld. He gives only what he has a right to give, viz., property exempt from his debts. His creditors cannot call that a fraud which can do them no injury. Their rights are not impaired by his giving away property not liable to attachment. No intent to defraud is pretended to have existed. The wife therefore had by gift all her husband's interest in the fund, and there was nothing left in him for his creditors to attach.

It is to be observed in this connection that the money has always been in her hands,—claimed by her as her own, and not interfered with by her husband.

3. A third ground for discharging the trustee was suggested in argument, and is deemed tenable by a majority of the court. It is that the contract between Mrs. Rines and her son-in-law may be fairly construed so that the money may be regarded as already by agreement invested in the land; the bargain so far consummated that she has an equitable right to demand a conveyance of the land upon payment of the \$450 still due, and the bargain remaining open for that to be done. The trustee says the note he gave her was only for a temporary purpose, and to await the completion of the contract. In this view, the note as between the parties would rather be in the nature of a receipt acknowledging the amount paid than a promise to pay. I am unable to say that this view of the case is satisfactory to my mind.

Judgment affirmed.

HOMESTEAD IS EXEMPT FROM SALE UNDER EXECUTION: *Ackley v. Chamberlain*, 76 Am. Dec. 516, and note 518; *McDonald v. Badger*, 83 Id. 123; see *Bishop v. Hubbard*, 77 Id. 132.

LAND PURCHASED WITH DESIGN TO MAKE IT HOMESTEAD IS NOT EXEMPT FROM JUDICIAL SALE upon a debt contracted after such purchase and before its actual occupancy as a homestead, *semble*: *Christy v. Dyer*, 81 Am. Dec. 493.

RIGHT OF WIFE TO PROTECT HOMESTEAD BY ACTION: *Guiod v. Guiod*, 76 Am. Dec. 440, and note 442.

THE PRINCIPAL CASE IS CITED to the first point stated in the *syllabus* in *Mitchell v. Milhoan*, 11 Kan. 628.

WAKEFIELD v. CONNECTICUT AND PASSUMPSIC RIVER RAILROAD COMPANY.

[37 VERMONT, 330.]

STATUTORY REQUIREMENT THAT BELL ON LOCOMOTIVE ENGINE BE RUNG, OR WHISTLE BLOWN, for a specified distance at crossings, imposes a duty upon railroad companies, not only in reference to persons approaching or in the act of passing the crossing, but in reference to all persons who, being lawfully at or in the vicinity of the crossing, may be subjected to accident and injury by the passing train.

IN CASE OF OMISSION TO GIVE SIGNAL AT CROSSINGS, AS REQUIRED BY STATUTE, and damage ensues in consequence, the railroad company must show that the omission was reasonable and prudent.

ACTION on the case. It appeared from the plaintiff's evidence that he was driving four horses harnessed to a wagon, and had crossed the defendants' track, and had driven about thirty-five rods south, when a train came over the road from

the south, and was within five or six rods of the team when first discovered by him and his horses. The forward pair of horses, being greatly frightened, instantly turned back, with such force as to break their fastenings to the other horses, and ran toward the crossing. When the train was opposite the plaintiff, and just as the horses broke away, the engineer sounded the whistle, and the train continued forward and over the crossing, where the two horses were injured by the passing cars. The evidence also tended to show that no signal was sounded on the train at the prescribed distance from the crossing, nor until the horses had broken away. The defendants' evidence tended to show that the engineer omitted to sound the whistle at the prescribed distance from the crossing, because the plaintiff's horses appeared to be frightened, and fearing that the sound of the whistle would increase their fright and add to the danger; and that he sounded the whistle when the engine was about against the horses moving toward the crossing, thinking that the sound would cause them to turn, and thus avoid the crossing. And the defendants' counsel requested the court to charge, that if the engineer omitted to sound the whistle because the plaintiff's horses appeared to be frightened by the train, and because he feared the whistle would frighten them more, that as to the plaintiff this was a prudent and reasonable cause of conduct, and the defendants would not be liable. The court declined so to charge, but did charge in substance that if the omission to sound the whistle caused the injury, the plaintiff might recover, although such omission was reasonable and prudent, and apparently for the plaintiff's benefit. To the charge as given, and the omission to charge as requested, the defendant excepted. Verdict for the plaintiff.

B. N. Davis and T. P. Redfield, for the defendants.

G. C. and G. W. Cahoon, and Peck and Fifield, for the plaintiff.

By Court, BARRETT, J. By section 55, chapter 28, of the General Statutes, it is required that, on every locomotive-engine, the bell shall be rung, or the steam-whistle blown, at least eighty rods from the place where the railroad shall pass any road or street on the same grade, and the ringing or blowing shall be continued until the engine shall have passed such crossing.

Two questions are made in this case under this provision of

the statute: 1. Whether the plaintiff, having passed the crossing, and got some thirty-five rods from it, on his way, before the engine arrived at the place prescribed, may insist upon having the bell rung or whistle blown, as upon a duty due to himself. It seems plain that the purpose of the law is to secure as much safety as could be done by notice of the approach of an engine, against accidents at and by reason of such crossing. While such accidents are, in the main, likely to happen to persons approaching, and about passing such crossing, yet they are not confined to such persons. And we think it would be an unwarrantable restriction of this provision of the statute to hold that the duty thereby imposed has reference only to persons approaching, or in the act of passing the crossing. In our judgment, that duty exists in reference to all persons who, being lawfully at or in the vicinity of the crossing, may be subjected to accident and injury by the passing of engines at that place.

This case presents a rare and extreme instance of alleged injury resulting from the failure to blow the whistle; and upon the evidence stated in the bill of exceptions, the connection of such failure with what then happened to the plaintiff and his team seems very slight and conjectural. Still, we do not feel warranted in holding that some connection, in the character of cause and effect, did not exist; or that the plaintiff may not hold the railroad company responsible for any injury caused to him by an unwarrantable omission to ring the bell or blow the whistle in this instance.

The other question is, whether, by force of that provision of the statute, a railroad company is liable, in all cases, for injury that may happen by reason of an omission to ring the bell or blow the whistle within the prescribed limits.

In section 55 the requirement is affirmative and unconditional. But in section 56 it is enacted, that if any railroad corporation shall unreasonably neglect or refuse to comply with the requisitions of the preceding section, they shall forfeit, for every such neglect or refusal, a sum not exceeding two thousand dollars. The corporation could not be subjected to that penalty unless such neglect or refusal should be shown to be unreasonable. This clearly implies that in the contemplation of the law there may be cases in which such neglect or refusal would be reasonable; and if reasonable, the penalty would not be incurred.

In a prosecution for the penalty the burden would be upon

the prosecutor of showing the neglect or refusal to have been unreasonable; and upon first impression it might seem that the rule as to the liability of the corporation is the same *civiliter* as *criminaliter*. But on very full consideration the court are unable to adopt that view.

At common law it would be the duty of the corporation to exercise all reasonable care in the running of engines and in the general use of the railroad; and to adopt all proper precautions against accidents likely to happen by reason of the road; and the faulty neglect of the corporation in these respects would, when affirmatively shown, subject them to liability for injuries caused thereby. We think the provision of the fifty-fifth section was designed to operate more stringently in this respect than the common law; and while it was not designed to subject the corporation to civil liability, entirely regardless of the circumstances and occasion of the omission to ring the bell or blow the whistle in all cases of injury caused by such omission, still it was designed to require as the general rule that the bell should be rung or the whistle blown in all cases; and in case of injury by reason of an omission so to do, to impose the burden on the corporation of showing that such omission, in the exercise of a sound judgment by the engineer, in view of the condition of things as they existed at the time, was reasonable and prudent. When, therefore, in a case like the present the plaintiff should show that the alleged injury was caused by such omission, it would not be necessary to his right of recovery that he should take the burden of showing affirmatively that such omission was unreasonable and imprudent; but it would rest upon the defendant, as a matter of defense, to show that it was reasonable and prudent.

This seems to us to secure to individuals and to the public all the protection that is practicable to be afforded in this way, and all that the statute was designed to secure. It seems to us to be not reasonably supposable that the statute was designed to make the doing of these acts a matter of indispensable legal duty in all cases and under all circumstances; for it is easy to conceive of cases, and they actually occur, in which the ringing of the bell or the blowing of the whistle would consummate with disaster the peril in which the party was already placed,—disaster which might not have occurred if the ringing or blowing had been omitted. In such a case it would certainly be not only unreasonable, but sometimes, under existing circumstances, little short of murderous to ring

or blow. It would be a case plainly contemplated by the statute as likely enough to occur; and this is manifested by section 56 in providing as to the penalty.

In our opinion, therefore, the liability of the corporation should be left to stand upon this, viz.: whether in the judgment of the jury upon all the evidence the omission in the given case, in view of the actual condition of things at the time, was reasonable and prudent. This leaves the matter to be settled, not by the judgment of the person running the engine, but by the judgment of the jury, exercised upon the circumstances in which the engineer was placed at the time he withheld the ringing of the bell or the blowing of the whistle.

This holds the corporation and the engineer, not merely to the exercise of an honest good faith and intention, but to the exercise of reasonable judgment and prudence. It holds the corporation responsible for the competency, in this respect, of the engineers, and at the same time does not preclude the exercise of such judgment and prudence, with a view to relieving impending peril, and avoiding probable disaster to the imperiled party.

Upon the evidence set forth in the bill of exceptions, we think that, as to the subject-matter of the second request, the defendants were entitled to a charge substantially conformable to the views of the court as above indicated.

The judgment is reversed, and the case remanded.

DUTY OF RAILROAD COMPANY TO PROVIDE WARNING OF DANGER AT CROSSINGS: *Chicago etc. R. R. Co. v. Still*, 71 Am. Dec. 236, and note 239.

WHEN FAILURE TO GIVE WARNING OF APPROACHING TRAIN AT CROSSING IS NEGLIGENCE: *Milwaukee etc. R. R. Co. v. Hunter*, 78 Am. Dec. 699, and cases collected in note 706.

DUTY OF TRAVELER TO LOOK OUT FOR TRAIN ON APPROACHING CROSSING: *Pennsylvania R. R. Co. v. Ogier*, 78 Am. Dec. 322, and note 327.

RAILROAD COMPANY NEGLECTING REASONABLE PRECAUTIONS besides ringing bell, as required by statute, to avoid collision with a vehicle at a crossing, is liable for an injury arising from such neglect, and it is for the jury to judge as to whether or not such additional precautions have been neglected: *Linfeld v. Old Colony R. R. Co.*, 57 Am. Dec. 124.

THE PRINCIPAL CASE IS CITED to the first point stated in the *syllabus* in *Norton v. Eastern R. R. Co.*, 113 Mass. 368; and is cited in support of the same doctrine in *Schmidt v. Milwaukee etc. Railway Co.*, 23 Wis. 194; and see *Hill v. Portland etc. R. R. Co.*, 55 Me. 438.

WOOD v. WILLARD.

[87 VERMONT, 377.]

DECLARATIONS OF DECEASED PERSONS WHO HAD ACTUAL KNOWLEDGE AS TO LOCATION OF ANCIENT BOUNDARY between individual proprietors, or who had peculiar means of knowledge, so that it may fairly be inferred that they had actual knowledge, made at a time when they had no interest to misrepresent, and made when upon or in the immediate vicinity of the line, and when pointing it out, may be received as to the location of such line, when from lapse of time there can be no reasonable probability that evidence can be obtained from those who had actual knowledge on the subject.

FACT THAT DEFENDANT HAD, FOR MORE THAN TWENTY YEARS, INCLOSED LAND IN DISPUTE, with his other lands, by a fence which extended and embraced other land of the plaintiff beyond a line not indicated so as to be discernible, up to which the defendant claimed by adverse possession, would not give the defendant constructive possession to such line.

TRESPASS on the freehold. The facts are stated in the opinion. Among other things, the court charged the jury, in substance, as set forth in the second point in the *syllabus*, to which the defendants excepted. The verdict was for the plaintiffs.

Converse and French, and A. Tracy, for the defendants.

Washburn and Marsh, for the plaintiffs.

By Court, **PIERPOINT, J.** This is an action of trespass on the freehold, and the controversy between the parties at the trial below was as to the location of the dividing line between owned by the plaintiffs and lands owned by said James N. Willard.

It appears from the bill of exceptions that prior to the year 1812 a controversy had arisen between one Thomas Denny and Charles Willard, who were then the owners of these lands, as to the dividing line between their respective lands, and a suit between them was pending in court.

This controversy was settled by the parties by their agreeing upon a division of said lands, and deeds of partition were thereupon executed, dated the twenty-sixth day of August, 1812. The line of division then agreed upon is the line now in dispute. The said Charles Willard, from whom the plaintiff's title is derived, took the west part, and the said Denny, from whom the defendant's title is derived, took the east part. On the 22d of March, 1817, Charles Willard mortgaged his part to David H. Sumner, who perfected his title thereto by foreclosure, and a writ of possession in June, 1820, and deeded the same to the plaintiffs on the twenty-fourth day of April,

1860. Thomas Denny conveyed his half to Thomas A. Denny April 5, 1819, and Thomas A. Denny conveyed the same to the defendant, James N. Willard, January 17, 1829.

The land in controversy is bounded northerly by Hartford town line, and southerly by Quechee River.

The defendant claimed that the true corner on the Quechee River was at the mouth of a little brook, and that formerly there stood at the mouth of this brook, on the bank of the river, a hemlock tree, marked, which was washed away by the river, with the bank on which it stood, some thirty years ago, and that this tree was the corner on the river. The defendants also claimed that a certain soft maple tree, standing on the Hartford town line, was the true corner there, and that the division line between the said James N. Willard's land and that of the plaintiffs', was a line drawn from the said hemlock to the said maple. And to establish this claim he offered to prove that on several occasions after the said Charles Willard had ceased to be the owner of the land now owned by the plaintiffs, or to have any interest therein, or in either of said pieces, and before any controversy had arisen, he being upon the land and at the place, pointed out the said hemlock tree, and the said soft maple tree to the witnesses, as being the corners of the said lots as agreed upon at the time of the division of the said lots between the said Thomas Denny and himself.

The defendant offered similar acts and declarations of the said Thomas Denny, made under said circumstances. The said Charles Willard and the said Thomas Denny being both dead.

These acts and declarations were objected to, and excluded by the court, and in this it is claimed there was no error.

These declarations of Willard and Denny were hearsay testimony only, and clearly come within the general rule, that such testimony is not admissible. To this rule, however, there are certain well-established exceptions, and the question here is whether the evidence offered comes within any of those exceptions.

In England, it is well settled that in questions as to ancient boundaries, concerning the extent of public municipal jurisdictions, public reputation, or the particular declarations of deceased persons, made before the controversy arises, are admissible: See Phillips on Evidence, 4th Am. ed., note 87, where the authorities are collected and examined, a further reference to which is unnecessary here.

But the exception has not been extended there to questions as to the boundaries between the estates of private individuals.

This exception seems to be founded in the necessity of the case. Questions as to these boundaries may arise long after all persons having any actual knowledge as to their location shall have passed away; and there may be no other way of proving them, except by public reputation and tradition. The same reason seems to have led to an exception allowing this class of evidence in questions as to pedigree.

The reason upon which this exception is based would seem to apply with equal force to questions as to boundaries between individuals. The fact that many persons may be interested in the establishing of the line of a municipal jurisdiction cannot increase the difficulty of proving it under the general rule of evidence.

The landed estates in England are large, and the boundaries thereof doubtless generally settled and clearly defined, so that questions as to them may not so frequently arise, and the necessity for resorting to this class of evidence for that reason may not be so great as in the case of municipal boundaries. In this country it is not so. In many of the states, and especially in this state, the territory within their limits was first divided into townships, and these were soon after subdivided into small lots, and distributed between the several proprietors. Almost the only evidence that was left upon the land to indicate the location of the lines, either of the townships or of the division between the proprietors, was marks upon the trees standing thereon, and these evidences, from lapse of time, accidental causes, and the cutting off the timber, are almost obliterated, at least, such is the fact in large portions of this state.

Questions are now constantly arising between individuals as to the location of these original lines, which to a great extent constitute the present division lines between adjoining land-owners. How are these lines to be established? If it be said that it must be by the testimony of witnesses who have personal knowledge of their original location, they cannot be proved at all, as in the great majority of cases, all such persons are now dead.

The necessity resulting from the impossibility of proving the location of such ancient lines and boundaries has led the courts in several of our sister states to extend the exception to the general rule excluding hearsay testimony, so far as to

admit the declarations of deceased persons, who had knowledge on the subject, as to the location of ancient boundaries between the lands of private individuals.

Thus in *Smith v. Powers*, 15 N. H. 546, which was an action of trespass on the freehold, it appears from the case that there was a controversy between the parties respecting the true situation of the northerly and easterly lines of the lot in question. The plaintiff introduced evidence that one John Rowell lived on the lot with his son. It did not appear what title he had, or that he had ever parted with it, if he had any, except that he moved away thirty or forty years before, and had not lived on the lot since. The plaintiff offered the declarations of said John, who had deceased, made after he had moved from the lot, that a certain birch tree standing near the river was the southeast corner of the lot. This was objected to and admitted.

In disposing of this question, Parker, C. J., in his opinion, says: "As to the declarations of John Rowell: it does not appear that he had any interest in making them, or any purpose to subserve thereby. It is true, as the defendant's counsel contend, that the decisions in England seem to restrict the evidence of the declarations of deceased persons, respecting boundaries, to cases which relate to public rights, or to boundaries in which several persons are interested, or to what the deceased said relating to the public opinion respecting the boundary. But the testimony has not been limited in this country. The authorities are amply sufficient to sustain the principle that the declarations of a person deceased, who appeared to have had means of knowledge, and no interest in making the declarations, are competent evidence upon a question of boundary, even in a case of private rights. Upon this principle the declarations of John Rowell are well admitted. It was in evidence that he pointed out the boundary." The same principle is recognized in *Lawrence v. Haynes*, 5 N. H. 37 [20 Am. Dec. 554].

The same rule prevails in Connecticut: *Higley v. Bidwell*, 9 Conn. 446; *Wooster v. Butler*, 13 Id. 308; *Kinney v. Farnsworth*, 17 Id. 355. In the latter case, Storrs, J., says: "Within whatever limits the rule of evidence as to the admissibility of reputation on questions of boundary is restricted elsewhere, it is well settled in this state that general reputation is admissible for the purpose of showing, not only public boundaries, such as those between towns, societies, parishes, and other

public territorial divisions, but also the boundaries of lands of individual proprietors.

In *Boardman v. Reed*, 6 Pet. 328, a question arose as to the admissibility of proof of the declarations of a deceased person as to certain facts relating to a corner in dispute between the parties. Judge McLean in his opinion states the rule as follows: "That boundaries may be proved by hearsay testimony is a rule well settled, and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force. Landmarks are frequently formed of perishable materials, which pass away with the generation in which they are made. By the improvement of the country and from other causes they are often destroyed. It is therefore important in many cases that hearsay or reputation should be received to establish ancient boundaries." "This," says Mr. Hill, in *Phill. Ev.* 219, note 87, "well expresses the doctrine, and the reason of the doctrine, as it is now understood in the American courts": See also *Hamilton v. Menor*, 2 Serg. & R. 69; *Nieman v. Ward*, 1 Watts & S. 68; *Speer v. Coate*, 3 McCord, 227.

From such cases as we have had an opportunity to examine, and from the other cases referred to by Mr. Hill in the note aforesaid, where all the cases are collected and examined, we think a disposition is apparent in many of the American courts to extend the exception in favor of this class of testimony to ancient boundaries between individual proprietors; and that from a majority of the cases the principle may fairly be deduced, that the declarations of deceased persons, who had actual knowledge as to the location of such boundaries, or who, from their connection with the property itself, or their situation and experience in regard to such boundaries and the surveys thereof, had peculiar means of knowledge, so that it may fairly be inferred that they had actual knowledge of the same, made at a time when they had no interest to misrepresent, and made when upon or in the immediate vicinity of the boundary referred to, and pointing it out, may be received as to the location of such boundary, when, from lapse of time, there can be no reasonable probability that evidence can be obtained from those who had actual knowledge on the subject.

Under this rule, we think the evidence as to the acts and declarations of said Willard and Denny, and perhaps of some

of the other persons, should have been admitted. The line in question was established between fifty and sixty years ago, and from aught that appears all the persons that had any actual knowledge of its location are dead, and the necessity for a resort to this class of evidence seems to be as strong in this case as in any that can arise.

The defendant, Willard, further claimed, on the trial below, that if he failed to establish the line as claimed by him as the true line, still he had acquired a title up to that line by adverse possession, and insists that there was error in the charge of the court in respect to this claim.

In regard to this, it is sufficient for present purposes to say that, upon the evidence as detailed in the exceptions, we think the charge of the court was entirely correct.

Judgment reversed and case remanded.

ADMISSIBILITY OF DECLARATIONS GENERALLY, DISCUSSED: *Printup v. Mitchell*, 63 Am. Dec. 258.

ADMISSIBILITY OF DECLARATIONS AS TO BOUNDARIES: *Whitney v. Bacon*, 69 Am. Dec. 281, and note.

HEARSAY EVIDENCE OF BOUNDARY: *George v. Thomas*, 67 Am. Dec. 612, and note 621.

STATEMENTS AS TO BOUNDARY LINES OF CERTAIN LAND, made by a deceased owner, are admissible in evidence against such owner's privies: *Pike v. Hayes*, 40 Am. Dec. 171.

THE PRINCIPAL CASE IS CITED and approved to the first point stated in the syllabus in *Powers v. Silsby*, 41 Vt. 290; *Miller v. Wood*, 44 Id. 381; *Child v. Kingsbury*, 46 Id. 54.

AM. DEC. VOL. LXXXVI—46

CASE
IN THE
COURT OF APPEALS
OF
VIRGINIA.

BRADSHAW v. COMMONWEALTH.

[16 GRATTAN, 507.]

LOST INDICTMENT CANNOT BE REPLACED by affidavit of the clerk or order of the court. Where the indictment is lost even after the arraignment the defendant cannot be tried.

PROVISIONS OF CHAPTER 180 OF CODE ALLOWING PAPERS IN ANY CAUSE lost or destroyed to be replaced by authenticated copies relate only to civil matters.

DEFENDANT was indicted for keeping a faro-bank, was arraigned and pleaded not guilty, and had his case continued until the next term. Before the case came on for trial, the indictment was lost or abstracted, and at the trial the commonwealth's attorney, being unable to replace it, was permitted on motion to file the affidavit of the clerk stating the loss, and giving what he believed to be a substantial copy of the indictment. At the trial the attorney called the clerk as a witness to prove the contents of the indictment mentioned in the affidavit. To all of these proceedings the defendant objected, his objections were overruled, and he duly excepted. The clerk gave his testimony, and upon the indictment thus established the trial was proceeded with and the defendant convicted. From the judgment upon this conviction he now appeals.

Goggin and Kean, for the appellant.

Tucker, attorney-general, for the commonwealth.

By Court, DANIEL, J. The question upon the decision of which depends the judgment to be given in the case is a nice

and difficult one. It is *res integra* here; and the counsel on either side and the court after a diligent search have failed to find any authority in the British reporters or text-books which would seem to rule it. The only case cited at the bar in which the question has been fully discussed and distinctly adjudged is the case of *Ganaway v. State*, 22 Ala. 772, relied on by the counsel of the plaintiff in error, in their printed argument. In that case, after several continuances of a prosecution for an assault and battery for which Ganaway had been indicted, the indictment was lost or destroyed, and the inferior court, upon the motion of the solicitor, after notice to the accused, allowed a paper which was offered as and proved to be a correct copy of the original indictment to be substituted in its stead, and proceeded with the trial upon the substituted copy. Upon an appeal to the supreme court the case was there ably argued, and the majority of the court came to the conclusion that the judgment of the circuit court should be reversed. The grounds of their decision are very forcibly stated in the opinion of Judge Phelan. After conceding the right of the court to supply or substitute any part of the record which has been lost or destroyed in a civil case, he proceeds to remark, that "in criminal proceedings we are, in many cases, bound by settled principles of law and practice to consider, not that which abstractedly exists, but a certain visible external form as essential to the legal existence and sufficiency of the thing itself. For instance, what authority in law," he asks, "will protect an officer in arresting my person on a criminal charge, or require of me to submit to the arrest? Will a copy of a warrant do? Not at all; it must be the original, lawful warrant itself, which I have a right to call for and inspect. This rule, we are inclined to think, has been commonly applied to indictments. The prisoner has been supposed to have a right to have an inspection of the indictment found, and to be arraigned on that only.

"But conceding that a declaration and an indictment are alike in many respects, in some other respects there is a very marked difference between them. A declaration is a statement of his cause of action by the party himself or his counsel not under oath. An indictment is a statement of the facts which constitute the alleged offense against the public, on the part of the accused, made under oath by a grand jury, and which to be good in law must have certain formalities; and by the constitution of this state certain words are essential.

The one is good even though it be not signed by counsel. The other is nothing if it does not bear the name of the foreman of the grand jury and the words 'a true bill.' These are indispensable marks of an indictment. The one may be changed at pleasure by leave of the court. The other cannot be changed or altered in the slightest degree by any power after it has been returned into court and the grand jury is discharged. The statutes of jeofails which in general terms authorize corrections and amendments in process and pleadings have never been held to apply to indictments.

"It may be granted, the court has and ought to have power to supply copies or duplicates of all parts of the record or proceedings which emanated from it or under its authority in the first instance; because the power which could make the original ought to be at all times able to supply a copy if that be lost or destroyed. But this power does not embrace an indictment. The court has no power to make an indictment or to direct one to be made; that power resides exclusively with the grand jury. Admitting, then, that a court may supply or substitute whatever part of the proceedings it has power to issue or create in the first instance, yet the principle will not embrace an indictment, because the court has no power to make that or direct it to be made. In the matter of indictments, the grand jury are the sole judges under their oath of the propriety of their own action."

The judge also stated in the course of his opinion, that with the exception of a single circuit, the rule of practice forbidding the substitution of an indictment prevailed throughout the state.

In the dissenting opinion delivered by Judge Gibbons, the only case cited by him as an instance in which it had been held allowable to try a person indicted, upon a copy of the indictment, was the case of *John v. State*, 2 Ala. 290. In that case, it is true, it was held that where several persons are indicted and the venue is changed by less than the whole number, those who change the venue are to be tried on a copy of the indictment. I have been unable, however, to discover anything in that case which countenances the proposition that an accused who has not obtained a change of venue may be tried against his consent upon any substitute for the original indictment. On the contrary, I think the case looks the other way. There the venue had been changed at the instances of one of several persons indicted for a felony, and an order had

been made sending not only a transcript of the record, but also the original indictment to the court to which the venue was changed. Subsequently another order was made requiring the clerk of the last-mentioned court to return the original indictment, which was executed, and the party who had not obtained a change of venue was tried on the original indictment so returned and convicted. And on his appeal it was insisted, in his behalf, that the prosecution had been discontinued and jurisdiction of the court over the case lost in consequence of the execution of the order directing the original indictment to be sent to the court to which the venue, as to one of the parties, had been changed.

Goldthwaite, J., in delivering the opinion of the court, sustaining the judgment of the court below, so far as it turned on the question arising upon the orders of the court below, above mentioned, remarked: "The presiding judge, at the time of permitting the change of venue as to Anderson, was probably misled by the generality of the rule of this court with respect to changes of venue. The rule was not intended to apply to criminal cases where more persons than one are indicted, when one only shall apply for a change of venue. In such a case, if the accused makes out a sufficient cause he is entitled by statute to a change of venue; but the original papers of right appertain to the court which retains jurisdiction over such of the accused as do not desire or cannot procure a change of venue. A transcript of the record which must necessarily include a transcript of the indictment, as well as of all other original papers, is all which can regularly be transmitted to the court to which the venue is changed. The accused, who under such circumstances asks for a change of venue, may be tried on such a transcript, and his consent, if that is to be considered as essential, will be inferred from his application. If the practice was otherwise, the monstrous absurdity might result that the prosecution against the others accused might be terminated or indefinitely delayed by the measure of grace accorded the one who sought elsewhere a trial which he might not obtain in an impartial manner in the county where the indictment was preferred." He then proceeded to show that the irregularity which had occurred, of sending the original papers to the court to which the venue had been changed, had worked no injury to the plaintiff in error; that the order for the retransmission of the indictment to the court in which the prosecution originated was right; and that there had been no discontinuance of the case.

There is nothing in the decision of the court, nor in its opinion, bearing adversely to the case of the plaintiff in error here. He has had no agency in creating the necessity or exigency by which it is sought to justify his trial on a substituted indictment. He is in no degree chargeable with the absence of the original. He has not procured nor sought a change of venue. He has given no consent, express or implied, to be tried on anything short of the original, identical indictment found.

The case of *People v. Burdock*, 3 Caines, 104, cited by the attorney-general, does not necessarily involve the decision that a person accused may, against his consent, be tried on a copy of a lost indictment. The reporter, it is true, in his *syllabus* states the case as deciding the general proposition that if a record of an indictment be lost the court will grant leave to file one *nunc pro tunc*. But on examination of the case, it will be seen that it does not go to any such length. The report of the case is very brief, and I give it entire: "An indictment found against the defendants for a forcible entry and detainer in April term, 1798, had, on being removed into this court, been quashed and restitution ordered; but the record of it could not, on search in the clerk's office, be found. Riker applied for leave to file a record *nunc pro tunc*, on an affidavit by the attorney employed in the prosecution, disclosing the above facts; and that on examination of his register he found not only that a record had been duly filed, but that he actually obtained an exemplification of it, which had been lost. Granted accordingly." When it is seen that in that case the motion was made in 1805, in respect to an indictment found in 1798, which had been long since quashed, it is obvious that the decision then made is no precedent for the case under consideration. It is manifest that there the substituted indictment was to be used for some purpose other than the trial of the person indicted.

The only case which I have been able to find in addition to those cited at the bar bearing immediately on the question in hand is that of *State v. Harrison*, 10 Yerg. 542. The decision and reasoning of the supreme court of Tennessee in that case are strongly in favor of the plaintiff in error in this. In that case, after the prisoner had been regularly indicted, tried, and found guilty of a felony by the verdict of a jury, he moved in arrest of judgment, on the ground that there was no bill of indictment on record against him. It appeared that the in-

dictment had been lost or mislaid during the trial, and upon diligent search could not be found; and the solicitor thereupon moved the court to make a copy of the indictment, together with certain affidavits, proving very fully that it was a correct copy, a part of the cause, which was done. The entry made upon the record was as follows: "State v. Harrison. The attorney-general appeared in open court and moved the court that the following copy of the indictment in this case and the affidavits annexed be made a part of the record in said cause. Whereupon the court, upon examination and inspection of the same, order the same to be spread upon the minutes and made a part of the record in this cause"; and a copy of the indictment and affidavits annexed was also inserted in the entry. In a bill of exceptions the judge recited that the copy of the indictment was filed upon record by him, not merely from the affidavits, "but because the court was fully satisfied that said copy of said indictment so ordered and made part of the record was an exact literal copy of the original indictment, not only from the affidavits appended to said copy, but from the recollection and memory of the court itself." The supreme court held that no judgment could be rendered against the prisoner upon a copy of the indictment thus spread on the records of the court below; and that the case was one proper for arrest of judgment.

In delivering the opinion of the court, Turley, J., after considering the general power of a court to alter and supply from its own memory alone any order, judgment, or decree pronounced by it at the same term, qualifies the concession with the remark that the principle doubtless applies with more force to things which have emanated from the court itself, for the reason that the judge may well recollect what he has himself directed to be done, and find it impossible to remember what has been done by others. And he then proceeds to say: "If the indictment could be supplied from the memory of the judge the record must show explicitly and certainly that it was so done. The recital in the bill of exceptions does not amount to this. To establish the principle that a judge might supply a lost bill of indictment upon the affidavit of others, independent of his own recollection, would, as we think, be exceedingly dangerous to the lives and liberty of the citizens; and we cannot do so. We think we go far enough in saying this may be done upon the memory of the judge."

The provisions of chapter 180 of the code, allowing papers,

"in any cause," lost or destroyed, to be substituted by an authenticated copy of what is lost or destroyed, or proof of the contents thereof, have obviously no application to the case. Though the language of those provisions is broad enough to cover the loss of papers in criminal prosecutions, yet, from the general frame and tenor of this chapter, and from its position in the code, as one of a series of chapters under the title of (51) "proceedings in civil suits," considered in connection with the declaration of the design set forth in the preamble of the code, to arrange the general statutes of the commonwealth "in appropriate titles, chapters, and sections," it is manifest that the remedy proposed by the provisions in question applies to the loss or destruction of papers in civil causes only.

Upon the whole, it seems to me that the plaintiff in error is entitled to a judgment of this court in his favor. There is no legislative provision regulating the practice in his case; there is no authoritative decision in England or Virginia ruling the point raised by him against him; whilst the weight of the few adjudications on the question by the courts in this country, of which we have any reports, is clearly in his favor. In this state of the law, I do not think we are authorized, by affirming the judgment, to introduce a practice which would tend to impair the efficiency of one of those guards which the law has provided for the protection and security of the citizen. Whenever, on a trial, the original indictment is substituted by parol proof of its contents, the accused is necessarily exposed to the hazard of being tried for and convicted of a charge differing in greater or less degree from that preferred by the grand jury. To expose to such a hazard an accused who is nowise responsible for the loss or destruction of the original indictment seems to me to be hardly in accordance with the spirit that regulates the proceedings in criminal trials; and I am for reversing the judgment.

The other judges concurred in the opinion of DANIEL, J.

Judgment reversed.

LOSS OF INDICTMENT, EFFECT AND REPLACEMENT OF. — There have been much fewer cases touching upon the point discussed in the principle case than would appear probable upon considering the multitudes of these instruments which are preferred into court, the character of persons whom their destruction would most benefit, and the apparent ease with which they might be abstracted. From the small number of cases which in any wise touch this question, where their ruling was not controlled by express statutes, it cannot be considered settled. In *Ganaway v. State*, 22 Ala. 772, the indictment was

lost before the defendant had been arraigned upon it, and the court said that it could not be replaced, even upon the most satisfactory proof that it was an exact copy. *State v. Harrison*, 10 Yerg. 542, is also an authority to some extent, that a lost indictment cannot be supplied. So, also, is *Boyd v. State*, 6 Cold. 1.

In a subsequent Alabama case it was decided that where the indictment is lost after the defendant has been arraigned, and his plea has been entered, the court has inherent power, without the consent of the prisoner or his counsel, to order the substitution of an indictment lost after that stage of the proceedings: *Bradford v. State*, 54 Ala. 230. The court in this case recognize the force of the reasoning of *Ganaway v. State*, *supra*, that where the indictment is lost before arraignment it cannot be replaced.

It is not indispensable to the validity of a sentence that the indictment should be among the records at the time the sentence was passed: *Mounts v. State*, 14 Ohio, 295-306. So the mere fact that the indictment was stolen or missing after the trial, and could not be sent up with the writ of error, will not justify this court in reversing the judgment: *Smith v. State*, 4 G. Greene, 189. In several of the states, statutes have been passed providing for the replacement of lost or destroyed indictments. The fact of the loss is to be entered upon the minutes of the court, which puts a stop to the running of the statute of limitations, and a new indictment is to be prepared. This second indictment is to be found in the same manner as the first, upon the testimony of witnesses sworn to give evidence before the grand jury: *State v. Elliott*, 14 Tex. 423; *State v. Adams*, 17 Id. 232. This statute was subsequently changed so that now when an indictment is lost, the district attorney may suggest the fact to the court, and the same shall be entered upon the minutes of the court, and in such case another indictment may be substituted upon the written statement of the district attorney, that it is substantially the same as that which has been lost or mislaid: *Clampitt v. State*, 3 Tex. App. 638; *Beardall v. State*, 4 Id. 631; *Graham v. State*, 43 Tex. 550. In Tennessee, the statute provides that indictments in cases of felony shall be entered in full on the minutes of the court, and that a copy of the minutes shall be as good and valid as the originals if at any time the latter are lost or destroyed. But a compliance with this statute must appear, and in no cases but those therein provided for can a defendant be tried upon a copy of an indictment: *Boyd v. State*, 6 Cold. 1-3. In Mississippi, the statute provides that where an indictment has been lost, destroyed, or quashed, the further time of six months shall be allowed for the finding of a new indictment: *Thompson v. State*, 54 Miss. 740-745. The statute in Indiana provides that indictments be recorded, and in case of their loss, the defendant may be tried upon a copy taken from the record and certified by the clerk: *Buckner v. State*, 56 Ind. 208. In Kansas and Georgia there appear to be statutes authorizing the replacement of lost indictments by copies: *Millar v. State*, 2 Kan. 174-181; *Reinhart v. State*, 29 Ga. 522.

In *Commonwealth v. Keger*, 1 Duvall, 240, the court, while conceding the power in a court to replace a lost indictment, say that it cannot be replaced by a different indictment found by a new grand jury. That the only effect of such proceeding would be the institution of a new prosecution in which the limitation would run up to the return of the new indictment into court. An indictment torn into three pieces which may be so united without the omission of any material word as to restore it substantially to the form in which it was presented in court by the grand jury, is sufficient as a basis for further legal proceedings: *Commonwealth v. Roland*, 97 Mass. 598.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

PRENTISS v. BREWER.

[17 WISCONSIN, 635.]

LAND DESCRIBED IN DEED AS "SOUTH HALF" of a certain quarter-section may be shown by extrinsic evidence to be one half in area of said section, and not one half according to the government survey.

WHERE LAND IS CONVEYED IN SECTIONS OR SUBDIVISIONS OF SECTIONS, IT IS PRESUMED that reference was had to the public surveys of the United States; but where land is conveyed in fractions of sections, as the south half of a certain section, extrinsic evidence is admissible to show that one half in area was meant.

IN EJECTMENT UNDER CODE, DEFENDANT MAY AVAIL HIMSELF OF ANY LEGAL OR EQUITABLE DEFENSE.

THE opinion states the case.

Barber and Fribert, for the appellant.

Enos and Hall, for the respondent.

By Court, COLE, J. We shall not stop to inquire whether the circuit court should have granted the nonsuit, because we are all clearly of the opinion that the testimony which was offered for the purpose of showing that the appellant was entitled to hold one half of the northwest fractional quarter, divided according to area or quantity, was improperly excluded, and therefore the judgment must be reversed for this reason, even if no other error existed in the case. It appears that both parties claim the premises in controversy by title derived from Burchard, but the appellant by the elder grant. It seems that Burchard purchased the entire quarter-section from the territory of Wisconsin in 1847, and received a patent

for the same, in which the land was described as "the north-west fractional quarter of section 1, town 7 north, range 14 east, containing 166 60-100 acres." For the purpose of establishing the facts set up in the answer, and of showing that the quarter-section should be divided into equal parts by an east and west line through it, the appellant offered in evidence a written contract from Burchard to one Day and Young, dated in 1847, by which Burchard sold the fractional quarter-section to them, and agreed to quitclaim his interest in the land upon being paid the consideration therein mentioned within three years from date. Upon the contract was a written assignment by Day of his interest in the fractional quarter to one John Potter, and an assignment by John to Zebedee Potter; also a receipt thereon by Burchard of one year's interest and one half of the principal sum named in the contract; and likewise a written memorandum, signed by Burchard, in which he stated that he was to make John Potter a deed of an undivided half of the land on the expiration of the contract.

Now, when we consider the matter set up in the answer, and that the appellant had averred that Burchard, in November, 1850, on a part fulfillment of the contract, conveyed to Zebedee Potter the south half of the fractional quarter, intending by the language to convey one half of the land in quantity, that he was in the actual possession of the premises in dispute, had made valuable improvements on them, etc., it is very manifest that this written contract offered in evidence and excluded, together with the receipts and memorandum thereon, tended directly to prove his answer, and establish the facts upon which he relied to defeat a recovery. This is very obvious. The question then is, Was it competent to show by this kind of proof that, by the language used in the deed, one half of the fractional quarter, according to area or quantity, was intended to be conveyed to Zebedee Potter? The description as stated in the answer is, "the south half of said fractional quarter-section." Could it be shown by the contract, from which it appeared that Burchard had sold the entire tract to two persons, who owned equal interests; and by an assignment of one of those interests to Potter; the receipt by Burchard of one half of the consideration money; his written agreement to make Potter a deed of an undivided half of the land; the taking possession by Potter, in fact, of the south half according to quantity, and making improvements thereon.

or by any other extrinsic matter, — that one half in area was intended to be conveyed by this language? We are all of opinion that this evidence was admissible, for the purpose of showing what was intended to be conveyed by the deed.

The respondent, in making out his case, had offered in evidence two plats of the section, with a deed from Burchard to one Hall, dated in 1855, conveying "the north half of the northwest quarter of section 1," etc., and had deduced title through foreclosure proceedings on a mortgage given at the same time by Hall to Burchard. Now, his argument is, that since the land was described as "the north half of the northwest quarter," or "the south half of said fractional quarter," the parties must be presumed to have conveyed with reference to the government surveys, and not in reference to quantity or area; and that consequently he has a right to claim all the land lying north of a line eighty rods north of and parallel to the east and west quarter line of the section, as indicated upon the plats introduced in evidence. These plats show that the quarter-section is of an irregular shape, in consequence of Rock River running through its southeast corner, and if it is divided as claimed by the respondent, he will have 109 acres out of the 166.

While, in a philological sense, a conveyance of the north half or south half of the tract of land would mean a conveyance of a moiety or one of two equal parts of the tract divided by an east and west line, yet ordinarily, when land is described in this manner by numbers and quarters, we understand the language is to be construed with reference to the public surveys of the United States. It is well known that by this system of surveys, the lands are first surveyed into townships six miles square, by east and west and north and south rectilinear lines; and that the townships are again subdivided into thirty-six sections by lines running parallel to the township lines. At the corners of the townships monuments are established, and other monuments are also erected at the proper corners of sections; and the corners of half and quarter sections not marked on the surveys are placed as nearly as possible equidistant from those two corners which stand on the same line: Brightly's Dig. U. S. Laws, 446, 447. Persons were permitted to buy either entire sections, half-sections, quarter-sections, half quarter-sections, or quarter quarter-sections, in which case the corners marked in the surveys were established as the proper corners which they were intended to

designate: Id. 479, 481. As a general thing, in this state, lands are described in conveyances by numbers and quarters according to the subdivisions of the government surveys. It is therefore properly assumed, as a general rule, that the parties intend that these surveys should be resorted to for the purpose of determining the location and quantity of the land conveyed. And in such a case, it is undoubtedly true that the monuments established by the surveys are referred to to ascertain the boundaries. These, unquestionably, are the usual means resorted to to find the land. But although this is the general rule, yet that rule is not so inflexible as to exclude all other proof in regard to the intention of the parties. And while ordinarily it might be presumed, when a party conveyed a south half of a quarter-section, that the language was used in reference to the government surveys, still we think it is competent to show that the parties intended that one half of the quarter, according to area, should be conveyed. Had the description been "the south half," etc., "according to the government surveys," of course it would exclude the idea that the parties had any reference to the quantity. The government surveys could then alone be resorted to to determine the quantity and location of the land. But this is not the language of the deed. The deed conveys "the south half of the fractional quarter," which may mean half in area quite as naturally as any government subdivision. Indeed, it is not inconsistent with the language used to say that a moiety of the land was intended to be conveyed. But it is proposed to show, by extrinsic circumstances, just what the parties did mean by that expression,—that it was intended and understood to embrace one half in area. Was it not competent to do this? The language is vague, or rather, it is as applicable to one half in quantity as to any government subdivision; and in such case, we understand evidence is admissible to show what was intended. It comes within that class of cases mentioned by Professor Greenleaf, where parol evidence is resorted to to ascertain the nature and qualities of the subject-matter of a written contract, to explain the circumstances surrounding the parties, and thus to explain the contract itself by showing the situation of the parties in all their relations to persons and things around them: 1 Greenl. Ev., secs. 286–288; see also the authorities cited upon this point by the chief justice in the opinion in *Ganson v. Madigan*, 15 Wis. 144 [82 Am. Dec. 659]. But

even if the evidence offered was not admissible for the purpose of explaining the meaning of the language employed, which is vague and indefinite, or which is as applicable to one half in area as anything else, yet I think it was clearly admissible on another ground. I think it was competent to show that the description of the land according to the government survey did not conform to the intention of the parties, which is assumed to be to convey one half in quantity, and therefore that there was a mistake in drawing the deed. I deem it safe to rest the admission of the evidence on this ground, but in this my brethren do not agree with me. At all events, there can be no question that if the evidence showed clearly and satisfactorily that the description, when construed according to the government surveys, did not in fact embrace as much land as the parties supposed and intended should be conveyed, it would present the case of a mistake in the instrument; in other words, that the ordinary construction to be given the language did not conform to the meaning and intention of the parties. On this ground, I think the evidence beyond all controversy to be admissible. But to this view it is objected that the appellant ought not to be permitted to make this proof or establish the special matters stated in the answer, without first reforming the deed by a suit in equity; and that this must be done before he can rely upon it, even as a shield to his possession. But if there is a mistake in the description, does not this constitute an equitable defense to this action? If the appellant shows that the land claimed in equity belongs to him, and was intended to be conveyed to him, is not this sufficient to defeat a recovery? Since the adoption of the code, we suppose a defendant may avail himself of any defense, whether it be legal or equitable. If any equities exist which show that the respondent ought not to recover on his legal title, they are available to protect the appellant in his possession. This has been expressly ruled by this court in *Fisher v. Moolick*, 13 Wis. 321. But whichever view is taken, it follows that the evidence was admissible.

The judgment of the circuit court is therefore reversed, and a new trial ordered.

After the case was sent back, as appears from the above opinion, a new trial was had, and judgment given for defendant. Upon plaintiff's appeal, the following opinion was delivered by Mr. Justice Paine: "This case presents the same question it presented when here before. The argument of

the appellant consisted entirely of an attempt to show the incorrectness of the former decision. And he claimed that after admitting that where land was described in a conveyance as the south half of a particular quarter-section it would be construed to refer *prima facie* to the south half according to the government survey, it was wholly inconsistent and in violation of the settled rules of law to admit evidence to show that the parties really intended a conveyance of the south half in quantity. For, said he, where the parties in their written contracts use words having a fixed, established meaning, parol evidence cannot be received to show that they were used in a different sense. This is undoubtedly a correct proposition; but the fallacy of the argument consists in the assumption that it was admitted in the former opinion that the words in question here had any such fixed and established meaning as to make this rule applicable. So far from it, the decision was placed expressly upon the ground that the words may mean the one thing as well as the other. The south half of a quarter-section is a fit and strictly accurate and proper expression to describe the south half in quantity. It may also mean the south half according to the government surveys. Now, when a description may mean either of two things, and one as well as the other, how can it be said to have such a fixed meaning as to come within the rule relied on? Clearly it cannot, but it falls within the class of cases cited in *Ganson v. Madigan*, 15 Wis. 144, referred to in the former opinion. True, the appellant claimed that its meaning was fixed by the admission that such a description would be construed *prima facie* as referring to the government survey. But certainly that does not fix it. Where a phrase may mean two things, cannot the law for convenience and certainty in construction adopt a rule that it shall *prima facie* be held to mean one of them without at the same time rendering it impossible to show that it was intended for the other. Can it not adopt a *prima facie* rule without at the same time making it conclusive? We fail entirely to see the inconsistency or unreasonableness of holding that this may be done. The rule that ordinarily descriptions of this sort are presumed to have reference to the government surveys has arisen from the fact that in most cases a description according to quantity and according to those surveys would be the same. If the surveys were entirely accurate it would be, and they are generally sufficiently accurate to warrant the adoption of the *prima facie* rule that the parties had reference to them, and did not intend to examine into any slight discrepancies between them and the actual area. But when the question concerns a fractional quarter-section, as in this case, it is entirely different. There the difference between a half in quantity and a half according to the survey may be very great, and that although the survey is entirely accurate. To hold that a mere *prima facie* rule of construction, founded upon a usual but entirely different state of facts, should be applied here, and there held conclusive, is required neither by reason nor law. The judgment is affirmed."

PAROL EVIDENCE EXPLAINING DEED: See *Allen v. Lee*, 48 Am. Dec. 352; *Atkins v. Bordman*, 37 Id. 100; *Young v. Lorain*, 52 Id. 463. Parol evidence is admissible to identify real property indicated in a contract for its sale, and described therein with sufficient certainty so that it can be thus identified: *Colerick v. Hooper*, 56 Id. 505. Such evidence is admissible to explain a description in a deed in order to apply it to the subject-matter of the grant: *Morton v. Jackson*, 40 Id. 107. But it is not admissible for the purpose of showing that a different tract from the one mentioned in the deed was intended to be conveyed: *Norwood v. Byrd*, 42 Id. 406; see the case of *Hart v. Rector*, 53 Id. 157.

EQUITABLE DEFENSE TO ACTION OF EJECTMENT: *Tibben v. Tibben*, 59 Am. Dec. 329, and note. The principal case is cited to the point that wherever land is conveyed according to the government survey or description, and the monuments established by the original surveys can be found, these are controlling in *McEvoy v. Loyd*, 31 Wis. 145. The principal case is cited to the point that if the language of a written contract is plain and unambiguous, it is a question of law for the court to determine the intent of the parties from the words used. If, on the other hand, the language is doubtful or the intention not clearly expressed, and the ambiguity is such that it may be explained by other evidence, or if the meaning of the terms used is to be ascertained and determined by extrinsic proof, then the construction is usually a question of fact for the jury, in *State v. Conklin*, 34 Wis. 31; *Stroks v. Hartford Fire Ins. Co.*, 33 Id. 657; *Stroks v. Detroit etc. Ry Co.*, 21 Id. 554; *Morgan v. Burrows*, 45 Id. 217; *Lyman v. Babcock*, 40 Id. 512. It is cited in *Du Pont v. Davis*, 35 Id. 639, to the point that equitable defenses may be made available in actions of ejectment.

HILL v. STATE.

[17 WISCONSIN, 675.]

PRESENCE OF ACCUSED DURING PROGRESS OF TRIAL. — Prisoner may voluntarily absent himself from the court-room during a portion of the progress of his trial. Consequently, where the jury in a trial for felony returned and stated that they had agreed upon a verdict, but had not reduced it to writing, and were sent back to prepare a written verdict, and where, when they returned, the prisoner was not present, and the jury returned their verdict, were polled by the prisoner's counsel and discharged before his return, the prisoner will not be given a new trial, unless he show that his absence was enforced.

IT IS NOT ENOUGH TO SHOW THAT ACCUSED WAS ABSENT FROM COURT-ROOM during the rendition of the verdict in his case. The burden is on him to show error, and he should make it appear that he was deprived of the right to be present, not merely that he was not present.

EVERY PERSON TRIED FOR FELONY HAS RIGHT TO BE PRESENT AT TRIAL, AND AT WHOLE OF IT, and if he should be deprived of his right without his consent, he will be given a new trial.

WITNESS MAY USE MEMORANDUM NOT MADE BY HERSELF to refresh her memory, if, after seeing the memorandum, she is able to recall the facts and testify to them as matters of recollection.

INSTRUCTION ENCROACHING UPON PROVINCE OF JURY. — It was essential to establish the identity of certain notes found where the prisoner was said to have concealed them with the ones charged to have been stolen. The court in its charge said that "one twenty-dollar note was positively identified": *Held*, error as the question of identity, no matter what the evidence was for the jury.

THE opinion states the case.

Montgomery, Tyler, and Wing, for the plaintiff in error.

Winfield Smith, attorney-general, for the state.

By Court, PAINE, J. When the jury came in with their verdict the prisoner was in court. The jury were asked if they had agreed, and replied in the affirmative, but that their verdict had not been reduced to writing. They were directed by the judge to retire, and bring in a written verdict, which they did. When they returned, however, though the prisoner's counsel was present and had the jury polled, still he himself was out of the room, and did not return until the verdict had been received and the jury discharged. Where he was, or what was the occasion or manner of his leaving the room, the record does not disclose, though it appears that he was not absent longer than five minutes. Upon this ground a motion for a new trial was made and overruled, which is alleged as error.

It is undoubtedly true that every person tried for a felony has the right to be present at the trial, and at the whole of it. And if he should be deprived of this right without his consent, it would be erroneous: R. S., c. 179, sec. 7; *Ross v. State*, 20 Ohio, 31; *People v. Perkins*, 1 Wend. 91.

In the case of *Prine v. Commonwealth*, 18 Pa. St. 103, it was held that the prisoner's counsel could not waive his right to be present. Whether the prisoner himself, if once personally present, could waive it or not, they did not decide, as no such case was presented. Yet, as they declared the right to be "inalienable," the inference might be drawn that they supposed the prisoner even could not part with it. But it is unnecessary to go to that length, or to determine—although the statute provides that no person shall be tried for a felony without being present at the trial—whether that is not a right secured to him, which, like many other important rights given by law, the party may waive if he deliberately and with full knowledge of his right sees fit to do so. It is clear that he may waive any trial at all. He may plead guilty, and thus subject himself to the worst results which might follow a trial. And if he can do this, it would be difficult to reconcile with the rule which allows it any reasoning that would prevent him from waiving any mere privilege on the trial that was designed only to aid him in shielding himself from those results. Of course, this reasoning would not be applicable to any right where a refusal to waive it might possibly prejudice his case so that he might be held to act in some degree under constraint. Such has been held to be the case where, during the progress of a trial, a juror has been taken sick, or from other

cause been unable to proceed. It has been said that the prisoner in such a case ought not to be put upon his election whether he would waive his right to a full jury, and allow the remainder to try him, because he might be induced by an undue desire to propitiate the remainder by manifesting confidence in them to waive a right which he otherwise would not. But however this may be, there does not seem to be any sound reasoning by which a prisoner indicted for felony, having the privilege of being present at the trial, and being in a condition to exercise it, may not voluntarily waive the right, so far at least as to be temporarily absent from the room during some portion of the progress of the trial. It has accordingly been held in several cases, the doctrine of which seems to us reasonable, that he may waive such right: *Wilson v. State*, 2 Ohio St. 319; *McCorkle v. State*, 14 Ind. 39; *State v. Wamire*, 16 Id. 357.

Such being our conclusion, we think it must be assumed upon this record that the prisoner was voluntarily absent at the moment the verdict was received. He had been present during the trial; he was present when the jury came in with their verdict. It is not probable that the court would order him removed during the short time required to write the verdict; and it does not even appear whether he was in custody or on bail. The burden therefore being on the prisoner to show error, he should make it appear that he was deprived of the right to be present, not merely that he was not present. For the latter fact is entirely consistent with the supposition that he may have voluntarily left the room at the time the verdict was received, without the knowledge even of the court or the officer. This fact, then, is no ground for reversal.

The indictment was for larceny in stealing several treasury notes. On the trial a witness was called to describe the notes: and as she could not describe them without refreshing her recollection, she was allowed to use for that purpose a memorandum which had been made by another person at the time the notes were found, but for the making of which the witness furnished the paper, and read the numbers of the notes to the other person, who wrote them down. The record is not very specific or clear in respect to what the witness said about the memorandum, though we understand it as meaning that she testified positively that such a memorandum was made, and that she believed the one presented her to be the same one. The bill of exceptions then states that "the witness testified to

the description of the treasury notes from the memorandum, although she had no recollection of the description without the aid of the memorandum"; and it is claimed that this evidence was erroneously admitted.

It is claimed by the prisoner's counsel that the witness could not be allowed to refresh her recollection by a memorandum not made by herself. But however this may be in cases where it is designed to use or read the memorandum in connection with the testimony of the witness, the latter not being able, even after refreshing his memory, to retain any present recollection of the facts stated, but only to say generally that he knew at the time that they were correctly stated, such clearly is not the rule where the witness, after seeing the memorandum, is able, by its aid, to recall the facts and testify to them as a matter of recollection. In such cases it matters not whether the memorandum was made by the witness or another, "for it is his recollection, and not the memorandum, which is the evidence": 1 Greenl. Ev., sec. 436; 2 Phill. Ev., Cowen and Hill's Notes, 922, 923; *Dorsey v. Gassaway*, 2 Har. & J. 410 [3 Am. Dec. 557]; *Coffin v. Vincent*, 12 Cush. 98. Such we understand to have been the case here. For we understand the statement in the bill of exceptions above quoted to mean that the witness, after using the memorandum, testified to the description of the notes from her recollection, although she could not have recollected it unless her memory had been thus aided. This evidence was therefore properly received.

Several exceptions were taken to the charge. And the counsel for the prisoner have criticised its general character, as partaking more of the nature of an argument against the accused than of an appropriate charge by the court. There may be some ground for such a criticism. But without attempting to determine whether there is anything in its general character to justify a reversal of the judgment, we think there is one portion in which the judge encroached so directly upon the province of the jury that the judgment ought not to stand. Certain notes, corresponding in description with those stolen, had been found at a place where it was claimed the prisoner had concealed them. The identity of these notes with the ones stolen was a most essential fact in the chain of evidence by which he was to be convicted. The judge charged the jury that "one twenty-dollar note was positively identified." And then he proceeded from that as a starting-point to argue

quite forcibly in favor of the identity of the others. Now, what the evidence was in respect to the identity of this one note, the bill of exceptions does not disclose. Yet, whatever it was, it was a question of fact for the jury. And although there may have been positive evidence tending to identify it, yet it is for the jury to pass upon that evidence, and not for the judge. To say that a fact is positively established, and that there is positive evidence tending to establish it, are different propositions. In the former case, the jury take the fact as a starting-point. In the latter, they consider the positive evidence, and pass upon its credibility and effect. This portion of the charge seems therefore liable to the objection indicated in the exception taken to it, that it stated the effect of the evidence, instead of the evidence itself.

While courts may present to the minds of jurors, in criminal cases, such considerations as are appropriate to aid them in the proper and legal discharge of their duties, they must be scrupulously careful to leave to the jury the full exercise of its own functions. And as this was not done in this instance, the judgment must be reversed.

NECESSITY OF PERSONAL PRESENCE OF ACCUSED IN CRIMINAL PROCEEDINGS at all the different stages thereof is exhaustively discussed in the note to *Warren v. State*, 68 Am. Dec. 219, where the principal case is discussed.

MEMORANDUM, USE OF BY WITNESS TO REFRESH MEMORY: *Spring Garden Mut. Ins. Co. v. Evans*, 74 Am. Dec. 555, and note.

INSTRUCTIONS IN CRIMINAL CASES SHOULD GENERALLY BE HYPOTHETICAL IN FORM, and not assign a conclusive effect to circumstances, or assume that they are proved. Circumstances generally are not conclusive, but even when they are so, it should be left to the jury to determine whether those circumstances are established: *People v. Levison*, 76 Am. Dec. 505. Jury is the proper tribunal to determine questions of fact, but the judge is not thereby precluded from expressing to the jury his opinion on the weight and effect of evidence: *Kirkwood v. Gordon*, 62 Id. 418; *Inloes v. American Exchange Bank*, 69 Id. 190. Where evidence is conflicting in the least degree, the court should leave it entirely to the jury: *Buffington v. Cook*, 73 Id. 491. The principal case is cited in *Riggs v. Weise*, 24 Wis. 546, where it was held that where the correctness of entries in an account-book is established by positive testimony of a witness, he may state what facts appear therefrom, although he does not now remember those facts, and the entries were not made by him, but by another person from his memoranda. The principal case is also cited to the point that it is error for the court to express any opinion to the jury as to the weight or sufficiency of the testimony upon any fairly controverted or debatable question of fact, in *Ketchum v. Ebert*, 33 Wis. 614, and *Dingman v. State*, 48 Id. 491.

DUNNIGAN v. CHICAGO AND NORTHWESTERN RAIL-
WAY COMPANY.

[18 WISCONSIN, 28.]

IT IS DUTY OF RAILROAD COMPANY TO KEEP ITS CATTLE-GUARDS OPEN.
RAILROAD COMPANY IS GUILTY OF NEGLIGENCE IN PERMITTING ITS CATTLE-
GUARDS TO REMAIN FILLED WITH SNOW, so that cattle, which have escaped
upon a highway without their owner's negligence, may pass onto the track
and be liable to be killed. If any injury is thereby sustained, the com-
pany is liable for the damages, and the jury may be so instructed.

ACTION for damages. It was alleged that plaintiff's cattle were negligently killed by the defendant. The evidence introduced by the plaintiff tended to prove that the cattle were killed in consequence of being run over by a train on the defendant's track, at a point a short distance south of where the track crossed a highway; that the track was fenced on both sides; that along the south side of the highway there was a fence reaching down to the track on each side of the track; that across the track there was a cattle-guard; that the guard was at the time filled with snow closely packed, and for some time previous had been so filled; that there was an opening in the fence on the south side of the highway, a short distance east of the track, through which the cattle escaped upon the highway, that from the highway they went upon the track to the place where they were killed, by passing over the cattle-guard; that the plaintiff's land lay on the eastern side of the railroad, some distance south of the highway; and that the tract between plaintiff's land and the highway belonged to another person, but was not fenced off from the plaintiff's land. The material instructions given appear in the opinion. Verdict and judgment for the plaintiff.

Eldredge and Pease, for the appellant.

John Winans, for the respondent.

By Court, COLE, J. The circuit court gave, without qualification or amendment, the several instructions asked for by the appellant on the trial. Those instructions embraced many propositions defining the duties, rights, and liabilities of the parties. Among other things, the jury were told that if the evidence showed that the injury to the cattle was occasioned by the mutual negligence of the plaintiff and defendant, or if the wrongful act of the plaintiff co-operated with the misconduct of the defendant to produce the result, or if the

owner permitted his cattle to run at large in the highway or other place where they could pass at pleasure upon the railroad track, he was guilty of gross and culpable negligence; and in neither of the above-supposed cases was the company liable for the damages sustained by the killing of the cattle. The court then further instructed the jury that if they should be satisfied from the evidence that the cattle-guards on each side of the highway crossing the railroad of the defendant were filled with snow and allowed so to remain, and that the cattle of the plaintiff which were injured were running at large on such highway, having escaped thereon through the opening in the fence along such highway, without the knowledge of the plaintiff, and being there, passed upon such railroad and over such cattle-guards onto the track of such railroad, and the injury complained of occurred, and that the negligence of the defendant consisted solely in permitting such cattle-guards so to become and remain filled with snow, then the plaintiff would be entitled to recover.

The only exception taken in the case was to this instruction. We are of the opinion that it was strictly pertinent to the facts proven on the trial, and is sound in principle. The essence of the instruction is, that it was the duty of the company to keep its cattle-guards open, and not suffer them to remain filled with snow, so that cattle going along the highway would pass on to the track and be liable to be killed; that the company permitting its cattle-guards to remain in that condition was guilty of negligence, and if an injury was thereby sustained it was liable. This is what the instruction amounts to. Now, it is not pretended that the charter does not impose upon the company the duty of putting up and maintaining proper cattle-guards along its track. And why is this? Obviously for the protection of the property of the citizen. Yet to what purpose are railroad corporations required to put up such guards, if they are not to be kept open, but are permitted to fill up, so that cattle are liable to pass over them onto the track without any fault of the owner? Now, we are to assume in this case that the plaintiff was guilty of no negligence; that his cattle escaped from his inclosure into the highway without his knowledge, and then passed over onto the track of the company because the cattle-guards were filled with snow and had been permitted to remain in that condition, and while thus on the track were killed. If the company was not bound to keep its cattle-guards open, it was guilty of no negligence.

On the contrary, if it was its duty to keep them open, and it did not, and this negligence caused the injury complained of, then it is liable.

In view of the facts proven on the trial, we are of the opinion that the circuit court fairly laid down the law applicable to the case, and that the judgment must be affirmed.

Judgment affirmed.

CATTLE-GUARDS AND FENCES, DUTY OF RAILROAD COMPANY TO CONSTRUCT AND MAINTAIN: *Chapin v. Sullivan R. R.*, 75 Am. Dec. 207; *Chapin v. Sullivan R. R.*, 75 Id. 237, and notes to these cases.

THE PRINCIPAL CASE WAS DISTINGUISHED from *Fisher v. Farmers' L. & T. Co.*, 21 Wis. 76; and cited in *Curry v. Chicago etc. R'y Co.*, 43 Id. 677.

WEISBROD v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[18 WISCONSIN, 85.]

AT COMMON LAW WIFE COULD NOT APPOINT ANOTHER TO ACT IN HER STEAD, for she was incapable of acting for herself.

AT COMMON LAW FEME COVERT MIGHT BE ATTORNEY OF ANOTHER to make livery to her husband upon a feoffment; and a husband might make such livery to his wife.

WIFE MAY ACT AS AGENT OR ATTORNEY OF HER HUSBAND, and as such, with his consent, bind him by her contract or other act.

WIFE MAY ACT AS AGENT OF ANOTHER in a contract with her own husband.

AT COMMON LAW WIFE COULD CONVEY TO OTHERS AS HER HUSBAND'S agent, though she could not take by grant or gift from him. This distinction arose from the inherent difference between a mere power to convey and the conveyance itself.

DIFFERENCE BETWEEN MERE POWER TO CONVEY AND CONVEYANCE ITSELF is that the latter is regarded in law as a contract, while the former is not.

PERSON INCAPABLE OF CONTRACTING MAY BE DONEE OF POWER.

HUSBAND AND WIFE, FOR PURPOSE OF GIVING AND RECEIVING POWER either to and from each other or third persons, are to be considered as if no relation of marriage existed between them.

HUSBAND MAY ACT AS AGENT OF HIS WIFE in transactions relating to her separate estate, and may execute in her name a conveyance of her land under a power of attorney.

PRESUMPTION IS THAT PROPRIETOR OF ADJOINING LOT OWNS TO CENTER OF STREET, and that the purchaser takes to the center by virtue of a conveyance of the lot. People act upon this presumption in buying and selling, but it may be rebutted.

SAME — PRESUMPTION SHOULD BE CONCLUSIVE WHEN. — Where adjoining proprietors lay out their lands into city lots, acknowledging and recording their plats with nothing upon them to indicate the original boundaries, thus in fact extinguishing such boundaries, and intending that the lots

shall be bought and sold by the plats, and the plats alone, or where the plats indicate the center of a street as the line of original division, the presumption should become conclusive in favor of grantees and purchasers from either proprietor, without actual notice of the rights of the other.

TOWN PLATS, UNDER STATUTE, ARE INSTRUMENTS OF EQUAL SOLEMNITY WITH DEEDS. They are acknowledged and recorded in the same manner, and purchasers are supposed to look only to them to ascertain the extent of the rights and titles of the owners of lots.

MAKING, RECORDING, AND PERMITTING SALE OF LOTS ACCORDING TO TOWN PLATS CREATES ESTOPPEL upon adjoining owners from claiming a greater interest in the soil of streets than is indicated upon the plats, where the purchaser has no actual notice of any further claim.

TOWN PLATS ARE PUBLIC RECORDED REPRESENTATION THAT SOIL OF STREETS, subject to the public easement, belongs to the proprietors of the adjacent lots, and that the center of the street is the real line of division between them; and if by mistake or other cause the streets are in fact wider than the proprietors intended, the application of the rule must still be the same.

ADJOINING PROPRIETORS, BY MAKING AND RECORDING TOWN PLATS, MAKE CENTER LINE OF STREET the line of division of lots as to purchasers without actual notice; and each proprietor authorizes the other, as to lots owned by that other, to sell as the owner of one half of the soil of the streets fronting upon such lots.

PURCHASER OF TOWN LOTS IS AFFECTED WITH NOTICE FROM TOWN PLATS THEMSELVES, where the original boundary lines of lots fronting upon a street appear upon the plats and show that one adjoining proprietor owns more of the soil of the street than the other.

PURCHASER OF LAND ON EITHER SIDE OF COMMON COUNTRY HIGHWAY IS PROBABLY BOUND to ascertain the actual division line between it and the land on the opposite side, regardless of the easement by highway.

EFFECT OF RECORDING TOWN PLATS, AND MAKING SALE OF LOTS ACCORDING TO THEM — ESTOPPEL AS TO ORIGINAL PROPRIETOR. — Where A and B, as original proprietors, lay out their land into city lots, and the town plats indicate the center of a street as the line of original division, but it turns out on actual measurement that the street is wider than indicated, and that there is an intervening strip in the middle of the street claimed by A, then A and those claiming title under him to lots on one side of the street are estopped from setting up title beyond the center line of that street as against persons who purchased lots on the opposite side of the street after the plats were recorded, and without actual notice of A's title to the strip of land in the center of the street not indicated by the plats.

EJECTMENT for a strip of land lying near the middle of what was commonly known as Broad Street, in the city of Oshkosh. Plaintiff claimed the premises as part of lot 1, block E, and lot 26, block D, in the Second Addition to Oshkosh. The defendant claimed to occupy and use the premises as the property of one Miller, under a license from him. The opinion states the grounds upon which the parties severally rested their claims. Plaintiff, in making out his chain of title to lot

26, block D, offered in evidence the record of a power of attorney from Arabella Crary to Leonard P. Crary, dated June 11, 1853; and admitted that said Leonard was the husband of said Arabella at the time the instrument was executed. He also offered the record of a warranty deed from Arabella Crary and Leonard P. Crary to himself, executed in June, 1854, by said Leonard as attorney in fact of said Arabella, and for himself. This evidence was excluded, on the ground that a wife could not at that time execute a valid power of attorney to her husband, nor execute a deed by her husband as attorney. The jury were instructed, in substance, that if Miller's land included all the west half of Broad Street, and extended beyond the center of said street, but did not extend to the east line of the street, so that a strip of land remained between the east line of the Miller purchase and the east line of Broad Street, to which Miller had no title, then his quitclaim deed to the plaintiff did not convey to the latter that part of the street lying east of its center and in front of plaintiff's lot; and that if the defendant's track was constructed upon the strip so described, the plaintiff could not recover. Verdict and judgment for the defendant.

Whittemore and Weisbrod, for the appellant.

M. A. Edmonds, for the respondent.

By Court, DIXON, C. J. A *feme covert* may at the common law be an attorney of another to make livery to her husband upon a feoffment, and a husband may make such livery to his wife. She may act as the agent or attorney of her husband, and as such, with his consent, bind him by her contract or other act; or she may act as the agent of another in a contract with her own husband: Story on Agency, sec. 7. If it is no violation of the common-law principle of the unity of husband and wife for the wife to act as the agent or attorney of her husband, the conclusion would seem irresistibly to follow that it is no infringement of the same principle to allow the husband to act as the agent of the wife in cases where, by law, she is *sui juris*, and capable of acting for herself. At common law the separate existence of the wife was for many purposes merged in that of the husband, and she could do no act. Incapable of acting for herself, she could not appoint another to act in her stead. Her disability was general, and hence we find no cases in the books of agency in her behalf, either by her husband or another; certainly none by

her husband, unless they be some of very recent date, and which have arisen since the enactment of statutes enlarging the rights of married women, and in which the capacity of the husband to act as the agent of his wife seems rather to have been assumed than decided. Thus it will be seen from the report that it was assumed by the court of appeals in *Hauptmann v. Catlin*, 20 N. Y. 247, that the husband might act as the agent of his wife in transactions respecting her separate estate. Her separate property was charged in an action at law, under the lien act, upon a contract made by her husband as her agent. The opinion in the case was written by the same learned judge, whose language in *White v. Wager*, 25 Id. 328, is quoted by counsel for the respondent to prove that the husband cannot act as such agent. Thus, too, it was assumed by this court in *Hobby v. Wisconsin Bank*, 17 Wis. 167. But in neither case was the capacity of the husband to act, or the power of the wife to appoint him, directly raised or discussed. The question passed off *sub silentio*. But as we have already said, there seems on principle to be no reason to doubt the correctness of the doctrine thus assumed. The disability of the wife has in many respects been removed by statute, and she is now capable of acting, not only by herself, but by an agent, with no express limitation upon her power of appointment. If the doctrine of unity does not stand in the way, as it seems it cannot, then we see nothing to prevent her making her husband her agent, whenever she chooses to intrust him with the management of her affairs. It is true that the court of appeals held in *White v. Wager*, 25 N. Y. 328, that the statute does not enable the wife to convey land to her husband. It is also true that the statute does not authorize her to receive by gift, grant, etc., from her husband any real or personal property; and yet it would hardly be contended that this limitation upon her power to receive directly abrogates the common-law rule that she may act as the agent of her husband in the sale and disposition of the same property to others. So, too, at the common law she could not take by grant or gift from her husband; still she could convey to others as his agent. The distinction arises from the inherent difference between a mere power to convey and the conveyance itself. The former is not regarded in the law as a contract, whilst the latter is. Hence a person incapable of contracting may be the donee of a power; and husband and wife, for the purpose of giving and receiving a power either to

and from each other or third persons, are to be considered as if no relation of marriage existed between them. For these reasons, we are of opinion that the power of attorney from Arabella Crary to her husband and the deed from her to the plaintiff, executed by her husband as her attorney in fact, should have been received in evidence.

Miller's addition to the city of Oshkosh was surveyed and platted, and the plat acknowledged and recorded, in March, 1847. This plat showed a street on the east side thereof forty feet wide. Conklin's plat, known as the Second Addition to Oshkosh, was laid out and recorded in April, 1848. This plat, on the west side thereof, showed a street forty feet wide, which together with the forty feet on the east side of Miller's addition constituted Broad Street, so called. The two plats together indicated a continuous space dedicated to the public as a street from the east line of lots in Miller's addition to the west line of lots in Conklin's addition, with no intervening ground in the center reserved by the owners, or either of them, for private use, and with nothing to show the real boundary or dividing line between them. It turns out that there was an intervening strip 27.26 feet in width, supposed to have belonged to Miller, lying between the forty feet dedicated by him and that dedicated by Conklin, which was not delineated on either plat, so that Broad Street, instead of being eighty feet wide, is found upon actual measurement to be 107.26 feet. Improvements commenced upon the street in 1849, and from that time to this it has been held and used by the public as a highway to its present width. The city authorities caused a map of the city to be made in 1853, on which the street was delineated as it then existed and now exists. It was graded and sidewalks constructed under their direction in 1855. In August, 1849, the plaintiff, through divers mesne conveyances from Conklin, acquired title to a lot on the east side of the street, and improved and built upon it in the spring of 1850. Miller conveyed the lot directly opposite on the west side of the street to one Papendick, in November, 1850. In June, 1851, Miller quitclaimed to the plaintiff the lot on the east side of the street, the title to which the plaintiff had already acquired through Conklin. Some question is made as to the effect of this quitclaim upon the rights of Miller to the strip of land in the center of the street, but as we are of opinion that Miller's title to the center of the street on the east side had already gone to the plaintiff, by virtue of the previous acts and

conveyances of the original proprietors, a consideration of this question becomes unnecessary. We are of opinion that the plaintiff, by virtue of his conveyance from Conklin, acquired title to the center of the street as it existed at the time Conklin conveyed. In other words, we think Miller, after what had occurred in the making and recording of the plats, is estopped from asserting title to the soil beyond the center opposite his lots, as against Conklin's grantees or those holding under them, who purchased without actual notice of the true state of the title to the street.

The well-settled presumption in all such cases is, that the proprietor of the adjoining lot owns to the center of the street, and that the purchaser takes to the center by virtue of a conveyance of the lot. People act upon this presumption in buying and selling. The right of soil in the street is a valuable right to the owner of the adjacent lot, as the facts of this case abundantly show. It is true that this is but a presumption, and ordinarily liable to be defeated by proof that the right of soil is altogether in one or the other of the adjoining proprietors, or that one has a greater or less interest than the other; but in a case like this, where the proprietors lay out their lands into city lots, acknowledging and recording their plats with nothing upon them to indicate the original boundaries, thus in fact extinguishing such boundaries, and intending that the lots shall be bought and sold by the plats and the plats alone, or where the plats indicate the center of a street as the line of original division, we think the presumption should become conclusive in favor of grantees and purchasers from either proprietor without actual notice of the rights of the other. Plats, under the statute, are instruments of equal solemnity with deeds; they are acknowledged and recorded in the same manner; and purchasers are supposed to look only to them to ascertain the extent of the rights and titles of the owners of lots. With nothing upon the plats to indicate that one proprietor has a greater interest in the soil of the streets than the other, nothing to warn the purchaser, and with no monuments upon the land itself, the estoppel created by making, recording, and permitting the sale of lots according to the plats ought to be as strong, nay, even stronger, than if the proprietor of the whole or the greater part of the soil of the streets, being present, should, without notice to the purchaser or claim of title in himself, permit the adjoining proprietor to sell upon a representation that such purchaser would take

title to the center of the street. The plats are a public recorded representation that, the soil of the streets, subject to the public easement, belongs to the proprietors of the adjacent lots, and that the center of the street is the real line of division between them; and if by mistake or other cause the streets are in fact wider than the proprietors intended, the application of the rule must still be the same. By making and recording the plats, they make the center line of the street the line of division of lots as to purchasers without actual notice; and each proprietor authorizes the other, as to lots owned by that other, to sell as the owner of one half of the soil of the streets fronting upon such lots. If the original boundary lines appeared upon the plats, showing that one proprietor owned more of the soil of a street than the other, or if it were the case of a common highway in the country, the question presented would differ materially from that under consideration. In the former case the purchaser would be affected with notice from the plats themselves; and in the latter he would probably be bound to ascertain the division lines regardless of the easement by highway. But upon the facts before us, we are inclined to think that the plaintiff took to the center of the street as it existed at the time of the conveyance from Conklin, and that the cause should have been submitted to the jury upon the principles above laid down.

The judgment is therefore reversed, and the cause remanded for further proceedings according to law.

WIFE MAY ACT AS AGENT FOR HUSBAND, and bind him by her contracts: *Benjamin v. Benjamin*, 39 Am. Dec. 384, and note 391; *Mackinley v. McGregor*, 31 Id. 522; *Felker v. Emerson*, 42 Id. 532; *Casteel v. Casteel*, 44 Id. 763; *Gates v. Brower*, 59 Id. 530; *Krebs v. O'Grady*, 58 Id. 312.

MARRIED WOMAN MAY MAKE POWER OF ATTORNEY: *Patton v. King*, 84 Am. Dec. 596.

MARRIED WOMAN'S POWER TO ACT BY AGENT, HOW CREATED: *Long v. Hickingbottom*, 64 Am. Dec. 118.

WIFE HAD NO POWER TO CONTRACT AT COMMON LAW: *Dobbin v. Hubbard*, 65 Am. Dec. 425, and note 432.

GRANT OF TOWN LOTS BOUNDED BY STREET CARRIES FEE TO CENTER THEREOF: *Paul v. Carver*, 67 Am. Dec. 413, and note 417; note to *Newhall v. Ireton*, 54 Id. 793; unless the terms of the grant show an intention to stop at the margin: *Paul v. Carver*, 64 Id. 649; note to *Paul v. Carver*, 67 Id. 417. And it makes no difference that the distances given in the deed bring the line only to the side of the street: *Cox v. Freedley*, 75 Id. 584.

CONVEYANCES OF CITY LOTS are not governed in all respects by the same principles of construction as are applicable to grants of property in the country: *Livingston v. Mayor of New York*, 22 Am. Dec. 622. Presumption

is that owners of land on each side of highway go to center of such boundary: *Paul v. Carver*, 67 Id. 413.

OWNER OF LOT BOUNDED BY PUBLIC STREET WITHIN RECORDED TOWN PLAT OR VILLAGE TAKES TO CENTER OF STREET, and owns the soil subject to the public easement: *Ford v. Chicago etc. R. R. Co.*, 80 Am. Dec. 791.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: As to the effect of the recording of plats and the sale of lots according to them, the principal case was adhered to in *Weisbrod v. Chicago etc. R'y Co.*, 20 Wis. 420, where it was said that the principal case should "be taken for just what it decides; namely, that Miller and those claiming title under him to lots on the west side of Broad Street are estopped from setting up title beyond the center line of that street as against persons who purchased lots on the opposite side of the street after the plats were recorded, and without actual notice of Miller's title to the strip of land in the center of the street not indicated by the plat." The principal case came up again in *Weisbrod v. Chicago etc. R'y Co.*, 21 Id. 608, where the facts appeared to be somewhat different, but the court did not see that they materially affected or changed the question of estoppel as decided by the court on the first appeal. "That decision," said the court, referring to the principal case, "was made upon the supposition that the plat of Miller's addition was properly acknowledged so as to entitle it to be recorded. It now appears that it was not. But this does not seem to me to affect the right of the plaintiff to hold to the center of the street. The only difference is, that in the one case the street became a public highway by grant, and in the other by dedication." It is now well settled in Wisconsin, that the grantee of a lot bounded by a public street in a recorded town plat, whether the lot is designated in the conveyance thereof by its proper number on the plat, or by some other appropriate description, takes to the center of such street, subject only to the public easement, unless the street is expressly excluded from the grant by something appearing upon the plat, or by the terms of the conveyance: *Kneeland v. Van Valkenburgh*, 46 Id. 437; *Pettibone v. Hamilton*, 40 Id. 411, and numerous other citations in these cases. The courts of Wisconsin have been liberal in applying the doctrine of dedication for public use as a highway, in case of recorded plats which purport to show by lines and figures the location and width of streets: *Jarstadt v. Morgan*, 48 Id. 249. A purchaser buys with full notice of the streets and alleys laid out on a town plat, and subject to them: *Burbach v. Schweinler*, 56 Id. 390. The title conferred upon the public authorities by a plat made under a statute passing title to the lands of streets and alleys to the county or other corporate authority is a qualified one only. The adjoining lot-owners own the fee to the center thereof, and if a street or alley is abandoned or vacated, such title is extinguished, and the adjoining owners will hold the fee by reversion: Id. 391. What was said in the principal case as to plats being required to be acknowledged and recorded "in the same manner" as deeds, was explained in *State v. Schwin*, 65 Id. 214, as not meaning that the acknowledgment of a plat should have the same words and form of an acknowledgment of a deed, because there was and is no such statutory requirement. "It meant only that it should be acknowledged and recorded the same as a deed, in order to have effect in passing the title of the streets and other grounds to the public. We think that the certificate of acknowledgment is substantially sufficient to entitle the plat to record, and is a sufficient dedication of Salisbury Street to the public, if, by the plat, its location and dimensions can be ascertained." With respect to "presumptions," the principal case was quoted from at some length in *Norcross v. Griffiths*, 65

Wis. 607, and the court there said that such presumptions had been applied with equal force and propriety to the owners of land upon the opposite banks of both navigable and non-navigable streams in the state of Wisconsin. The principal case was miscited in *Sherman v. Milwaukee etc. R. R. Co.*, 40 Id. 652. The point to which it is cited will be found in *Pfeifer v. Sheboygan etc. R. R. Co.*, *infra*, and note.

PFEIFER v. SHEBOYGAN AND FOND DU LAC R. R. Co.

[18 WISCONSIN, 155.]

FAMILIAR MAXIM, QU. SENTIT COMMODUM SENTIRE DEBET ET ONUS,
APPLIES TO THIS CASE.

MAN WILL BE BOUND BY THAT WHICH WOULD HAVE BOUND THOSE UNDER WHOM HE CLAIMS, *quoad* the subject-matter of the claim; for *qui sentit commodum sentire debet et onus*.

NO MAN CAN, EXCEPT IN CERTAIN CASES REGULATED BY STATUTE LAW AND LAW MERCHANT, TRANSFER TO ANOTHER BETTER RIGHT THAN HE HIMSELF POSSESSES; the grantee shall not be in a better position than he who made the grant; and therefore privies in blood, law, and estate shall be bound by and take advantage of estoppels.

IF PERSON ACCEPTS ANYTHING WHICH HE KNOWS TO BE SUBJECT TO DUTY OR CHARGE, it is rational to conclude that he means to take such duty or charge upon himself, and the law may very well imply a promise to perform what he has so taken upon himself.

LIABILITY OF NEW COMPANY TO MAKE COMPENSATION FOR LAND TAKEN BY OLD COMPANY FOR RAILROAD PURPOSES. — A railroad company appropriated plaintiff's land for its roadway, and damages were assessed by the commissioners under the company's charter. Plaintiff recovered judgment, which was never paid. Subsequently the railroad was sold under a mortgage, which covered the company's right of way, to persons who organized a new company under the statute, and continued to operate the road, using the track as laid across the plaintiff's land. Under these peculiar facts it was held that the plaintiff had a right of action on the judgment against the new company.

SAME — IF SUCH NEW COMPANY HAD ASSERTED NO RIGHTS UNDER ITS PURCHASE, except those which the mortgage sale gave as complete and perfect against all paramount claims, it would not have been liable to the plaintiff upon the mere ground that he had a judgment against the old company.

SAME — ELECTION AND EFFECT THEREOF. — BUT SUCH TAKING OF POSSESSION OF PLAINTIFF'S LAND, and asserting a right to use it, constituted a plain election by the new company to adopt the original taking and to receive the benefit of it. It therefore subjected itself to the conditions under which that right existed in favor of the old company.

SAME — ESTOPPEL. — NEGLIGENCE FOR UNREASONABLY LONG TIME TO PAY DAMAGES ADJUDGED TO PLAINTIFF might, perhaps, justify him in treating either company as a trespasser *ab initio*, while they were using his land; but the old company was estopped from claiming the character of a mere wrong-doer after proceedings had to condemn the land; and the new one, after having entered and asserted the rights of the old, thus ratifying and adopting the original taking, was equally estopped.

THE railroad company named as defendant objected to the admission of any evidence against it at the trial, on the ground that the complaint did not state a cause of action against it; and after the plaintiff had rested, moved for a nonsuit on the same ground, and also on the ground that the facts proved were not sufficient to charge it with any liability to the plaintiff. Motion denied. Verdict for the plaintiff, and judgment against said company upon the verdict, from which it appealed. Other facts are stated in the opinion.

J. A. Bentley, for the appellant.

E. Fox Cook, for the respondent.

By Court, PAINE, J. The plaintiff in this case owned lands which were taken by the Sheboygan and Mississippi Railroad Company for railroad purposes. Legal proceedings were had to assess the damages, which resulted in a judgment in the plaintiff's favor, which, however, was never paid. The road and property of the company were subsequently sold on a mortgage, and purchased for the benefit of the bond-holders, who organized the company that constitutes the present appellant. This action was brought to compel the new company to pay the amount of the plaintiff's judgment for damages.

The counsel for the company contends that it is not liable, and relies on the recent decision of this court in the case of *Vilas v. Milwaukee and Prairie du Chien R. R. Co.*, 17 Wis. 497. But the case presents an entirely different question. In that case, the plaintiff had consented to a conveyance of his title to the old company, so that he was left merely a general unsecured creditor. It followed that the new company, which was organized by the purchasers at the mortgage sale, could not be held liable unless upon the broad rule that such purchasers organizing anew under the statute were in legal effect a mere continuation of the old company, and liable for all its debts. Such a conclusion we held could not be sustained.

And it would follow from that decision that if the new company here had asserted no rights under its purchase except those which the mortgage sale gave as complete and perfect against all paramount claims, it would not have been liable to this plaintiff upon the mere ground that he had a judgment against the old company. But such was not the case. On the contrary, it took possession of the plaintiff's lands, and continued to run its cars over them, even in defiance of an injunction. Such a taking possession and assertion of right

constituted a plain election by the new company to adopt the original taking and to receive the benefit of it. It becomes, therefore, a case for the application of the familiar maxim, *Qui sentit commodum sentire debet et onus*. The rights of the old company in the land were not paramount to those of the plaintiff until the damages were paid. Perhaps he might have fallen back upon his original rights as owner, and treated the company as a trespasser *ab initio*, if it neglected for an unreasonable time to pay them. But if he did not do that, but asked only for his pay, the proceedings to condemn the land and assess the damages would stand as valid for those purposes to give the company such rights as it could get prior to payment. Then, if the purchasers under the mortgage step in and assert those rights, they must assert them subject to the condition upon which they exist, that is, the payment of the damages.

The counsel suggested that if these damages had not been paid the company was a trespasser, and the plaintiff might have his remedy for the trespass, but it ought not to be held liable for the judgment against the old company. But certainly the old company would be estopped from setting up in answer to a claim by a land-owner for damages, that it was a mere trespasser, because it had already unreasonably neglected to pay those damages, and therefore the owner could only recover for the trespass, and could not treat it as liable for having taken his lands for railroad purposes. The owner might perhaps treat it as a trespasser, but it does not rest with the company to assume the character of a mere wrongdoer or of one taking lands under its charter, according to whichever position might best suit its convenience. Having entered under the charter, so long as the owner chooses only to hold it to the responsibility of a legal taking, it is estopped from casting off that character and replying that it is only a trespasser. And if the old company would be so estopped, the new one, after having entered and asserted the rights of the old, thus ratifying and adopting the original taking, is equally estopped. "A man will be bound by that which would have bound those under whom he claims, *quoad* the subject-matter of the claim; for *qui sentit commodum sentire debet et onus*; and no man can, except in certain cases which are regulated by the statute law and the law merchant, transfer to another a better right than he himself possesses; the grantee shall not be in a better position than he who made the grant; and there-

fore privies in blood, law, and estate shall be bound by and take advantage of estoppels": Broom's Legal Maxims, 452. The entry by the new company must be referred to its character as purchaser under the mortgage and successor to the rights of the old, and it is not at liberty to repudiate this character. And "if a person accepts anything which he knows to be subject to a duty or charge, it is rational to conclude that he means to take such duty or charge upon himself, and the law may very well imply a promise to perform what he has so taken upon himself": Id. 451, 452.

The appellant claims that the amount of the costs in the injunction suit, to which the appellant was also a party, and which in that suit were adjudged solely against the old company, are improperly included in this judgment. But we see no exception which raises that question.

The judgment is affirmed, with costs.

RAILROAD COMPANY IS TRESPASSER, AND LIABLE TO ACTION, where it takes possession of land for which it has not already made compensation under the statute: See note to *Ford v. Chicago etc. R. R. Co.*, 80 Am. Dec. 794. A judgment is not compensation; it is only a security for compensation or satisfaction: *Thompson v. Grand Gulf R. & B. Co.*, 34 Id. 81.

THE PRINCIPAL CASE WAS CITED in *Lake Erie etc. R'y Co. v. Griffin*, 92 Ind. 492, 493, to the points that where a mortgage given by a railroad company is foreclosed, and all the property, rights, franchises, and effects of such company are duly sold under the decree of foreclosure, and a new company is thereupon organized under the laws of the same state for the purpose of owning and operating the line of railway previously owned by the old company, with all its franchises, rights, and property, the new railway company is not liable at law for the general debts of the old company, except such debts as it may have assumed. But where the old company has appropriated land for the purposes of its railroad, and a judgment has been rendered against it for the value of the land appropriated or condemned, and such judgment remains unpaid, the new company will be liable in equity, if it enters upon and occupies such land, for the payment of such judgment, upon the principle that it has adopted and ratified the original appropriation. The right of the owner to compensation for his property is protected by the constitution, and it will not do to say that his unsatisfied judgment against the old insolvent corporation affords him any just compensation. The maxim applies, *Qui sentit commodum sentire debet et onus*. The principal case was distinguished in *Gilman v. Sheboygan etc. R. R. Co.*, 37 Wis. 320; *Andrews v. Farmers' L. & T. Co.*, 22 Id. 292; and commented upon in *Gilman v. Sheboygan etc. R. R. Co.*, 40 Id. 657, 658. In *Sherman v. Milwaukee etc. R. R. Co.*, 40 Id. 652, it is said that if a railroad company take possession of land for which it is liable to make compensation, without the consent of the owner, and without having ascertained and paid the compensation under the process given by the statute, it is a trespasser, and liable in an action of trespass. It was probably intended to cite the principal case to this point, but instead of it *Welsbrod v. Chicago etc. R'y Co.*, 18 Wis. 35, S. C., *ante*, p. 743, is miscited in support of it.

TANNER v. BILLINGS.

[18 WISCONSIN, 163.]

PIANO OF LESS VALUE THAN TWO HUNDRED DOLLARS CANNOT BE RETAINED BY DEBTOR AS EXEMPT under a statute exempting personal property from sale on execution, and which, after specifying certain articles of household furniture, adds the following: "And all other household furniture not herein enumerated, not exceeding two hundred dollars in value."

THAT TEACHING MUSIC WAS ONE'S BUSINESS, at the time when his piano was attached, does not appear from the fact that he had taught music for pay within three months prior to the time of the seizure.

DEFENDANTS, a sheriff and deputy sheriff, had seized a piano belonging to the plaintiff, under a writ of attachment against his property. This action was brought to recover the value of the instrument. The only question presented is stated in the opinion. It was held that the piano was not exempt, and judgment was rendered for the defendants, from which the plaintiff appealed.

N. S. Murphy, for the appellant.

Edson Kellogg, for the respondents.

By Court, **PAINE, J.** The statute exempting personal property from sale on execution, after specifying certain articles of household furniture, adds the following: "And all other household furniture not herein enumerated, not exceeding two hundred dollars in value." The question presented in this case is, whether, under this provision, the debtor may hold exempt as furniture a piano of less value than two hundred dollars. We think that he cannot. For although a piano more nearly resembles some articles of furniture than most other musical instruments do, and although it may be used at times for some of the purposes of an ornamental table, yet these facts do not divest it of its acknowledged character as a musical instrument. And it would be contrary to the common understanding to say that musical instruments are included in household furniture.

The counsel relied on a class of cases where general expressions in wills have been very liberally construed, according to the supposed intentions of the donors. But even in those cases there was nothing going so far as to include a piano as furniture. But even if it might be possible in construing a will, where the circumstances indicate an intention in the testator to bestow everything in his house, to give this general word that effect, we should still think that the general object and

spirit of the provision of our constitution and statutes on the subject would forbid it here. For though the influence of music and "the concord of sweet sounds" may, as counsel claimed, be of a refining and elevating character, and though it may add much to the pleasure of a home, still the object of the exemption laws was not to surround the debtor with all possible pleasures and enjoyments at the expense of his creditors, but simply to postpone the claims of justice to those of mercy, by leaving him what the constitution describes as the "necessary comforts of a home."

The class of articles mentioned in the statute in immediate connection with this general clause, which are plainly necessary for a family, show that by this clause the legislature intended to indicate other articles of a like nature. And the limitation of the value to two hundred dollars, which is less than the usual cost of a piano, shows that they could not have had reference to that instrument. The obvious design of this provision was to enable the debtor to select from the usual articles of furniture, such as chairs, tables, stands, etc., an amount of the value mentioned. But a piano is a thing of so peculiar and distinct a character that it is clear, from the manner in which this statute is drawn, that if the legislature had designed to exempt it, they would have specifically mentioned it.

It appeared in the case that the plaintiff was a pianist, and that he had taught music for pay within three months prior to the time of the seizure. We do not consider this sufficient to show that teaching music was, at that time, his business. On the contrary, the special and peculiar manner in which this fact is stated would indicate that it was not. If that fact had appeared, it might have presented the further question, whether the instrument could have been claimed as exempt under the subsequent clause of the statute, which exempts the tools and implements, or stock in trade, of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, and the library and implements of any professional man, not exceeding two hundred dollars in value. But as it is, the case does not present that question.

The judgment is affirmed, with costs.

PIANO, SEIZURE OF ON EXECUTION: *Trieber v. Knabe*, 71 Am. Dec. 607, and note 611. As to exemption of other instruments of one whose business is that of a musician, see *Goddard v. Chaffee*, 79 Id. 796.

HAHN v. DOOLITTLE.

[18 WISCONSIN, 196.]

VENDOR'S REPRESENTATIONS OF VALUE AMOUNT TO WARRANTY, WHEN. —

A representation made by the vendor at the time of sale, respecting the quality of the thing sold, amounts to a warranty if such representation is relied upon by the vendee.

VENDOR OF NOTE AND MORTGAGE IS LIABLE TO PURCHASER, WHEN. —

Where the thing sold is a note and mortgage, the maker of which is known by both parties to be insolvent, and the vendor represents the mortgage to be good, as an inducement for the vendee to buy, and the latter, relying upon such representation, does buy, the vendor is liable to the purchaser for the consideration paid, if it turns out that mortgagor has in fact no title to the mortgaged premises.

WHERE ONE ASSESTS IN SINGLE SENTENCE THAT REPRESENTATION WAS MADE TO HIM AND THAT HE BELIEVED IT, the natural meaning of it is that he believed it because he relied on the truth of the statement, and not upon information that he might have derived from some other source.

ALLEGATION IN COMPLAINT THAT PLAINTIFF PURCHASED NOTE AND MORTGAGE ON FAITH OF DEFENDANT'S REPRESENTATIONS IS SUFFICIENT if in the following language: "That defendant represented to this plaintiff that said mortgage was good, and a valid security for the payment of said note, and this plaintiff supposed and verily believed, at the time he bought the same as aforesaid, the said mortgage to be good, and that it was a valid and sufficient security," etc. But the idea might be more distinctly expressed.

WHERE PARTIES REDUCE THEIR CONTRACT TO WRITING, such writing is presumed to contain the entire contract, as a general rule, and it cannot be shown by parol that other things were agreed on at the same time.

SAME. — THIS RULE, HOWEVER, IS NOT APPLICABLE TO INSTRUMENTS, such as deeds of land, assignments of choses in action, bills of sale, indorsements of notes, etc., which, from their nature, are adapted merely to transfer title, in execution of an agreement which they do not profess to show.

PAROL EVIDENCE ADMISSIBLE TO SHOW WARRANTY WHERE NONE IS CONTAINED IN WRITTEN ASSIGNMENT. — If a note and mortgage are transferred by a written assignment containing no words of warranty, parol evidence is admissible to show that the vendor warranted the mortgage security.

THE cause of action is stated in the opinion. A demurrer to the complaint was sustained, and from this decision the plaintiff appealed.

H. Barber, Jr., and M. B. Williams, for the appellant.

Enos and Hall, for the respondent.

By Court, PAINE, J. This action was brought to recover the consideration paid for a note and mortgage sold by the defendant to the plaintiff. It is alleged that both parties knew the note to be worthless save as secured by the mortgage, and

that the defendant, at the time of the sale, represented the mortgage to be a good and valid security for the note, and that the plaintiff believed this, but that in fact the mortgagor had no title to the land described, so that both note and mortgage were worthless.

We think this shows a cause of action. The rule is, that a representation made by the vendor at the time of the sale, in respect to the quality of the thing sold, which is relied on by the vendee, amounts to a warranty: *Henshaw v. Robins*, 9 Met. 83 [43 Am. Dec. 367]; *Randall v. Thornton*, 43 Me. 226 [69 Am. Dec. 56]; *Lamme v. Gregg*, 1 Met. (Ky.) 446 [71 Am. Dec. 489]; *Warren v. Van Pelt*, 4 E. D. Smith, 205; *Blakeman v. Mackay*, 1 Hilt. 266; *Smith v. Justice*, 13 Wis. 600.

This being the rule, there can be no doubt of its applicability here. Where the thing sold is a note and mortgage, the maker of which is known to be insolvent, the question whether the mortgage is a good security becomes very material. And if the vendor represents it to be good, as an inducement to the vendee to buy, and the latter buys relying on that representation, it presents a case clearly within the authorities cited.

The only doubt we have had as to the sufficiency of the complaint was, whether it showed with enough certainty that the plaintiff made the purchase on the faith of the defendant's statements. The allegation is, "that at the time of such sale and transfer, said defendant stated and represented to this plaintiff that said mortgage was good, and a valid security for the payment of said note; and this plaintiff supposed and verily believed, at the time he bought the same as aforesaid, the said mortgage to be good, and that it was a valid and sufficient security for the payment of said note." The idea that the plaintiff purchased on the faith of the defendant's representation might undoubtedly have been more distinctly expressed. But we have come to the conclusion that such is the fair interpretation of the allegation as it is. Where one asserts in a single sentence that a representation was made to him, and that he believed it, the natural meaning of it is that he believed it because he relied on the truth of the statement; and not upon information that he might have derived from some other source.

It appears from the complaint that the transfer was effected by means of a written assignment. And although its terms do not appear, yet the fair inference from the complaint is,

that there was no warranty of the sufficiency of the security in the assignment. And the respondent's counsel suggests that if there was no warranty in the assignment, none could be shown. He relies on the familiar rule, that where the parties reduce their contract to writing, the writing is presumed to contain the whole contract, and it cannot be shown by parol that other things were agreed on at the same time. No rule is better settled than this. But it is not applicable to instruments which, from their very nature, do not attempt to state the entire agreement in respect to the subject-matter, but are adapted merely to transfer title, in execution of an agreement they do not profess to show. Deeds of land, assignments of choses in action, bills of sale, indorsements of notes, and other similar instruments, are of this character. They are very commonly used in execution of complicated and extensive agreements, which they make no attempt to show. The presumption, therefore, that the writing contains the whole contract does not prevail. Thus, suppose A owns a note payable to his order, and B, by a verbal agreement, sells him a horse, warranting it to be sound, in consideration that A shall indorse to him the note. The indorsement would in one sense be a contract in writing. But would A be precluded from showing the verbal agreement of sale and warranty, merely because, in execution of it, there was a written indorsement in which the warranty was not recited? Certainly not; and the same considerations are applicable to assignments, bills of sale, and other similar instruments, where they profess to do no more than merely to transfer title in the usual manner.

This question was considered in *Frey v. Vanderhoof*, 15 Wis. 397, and the view above stated was sustained, and several authorities cited in support of it. In addition to those, the following may also be referred to: *Wentworth v. Buhler*, 3 E. D. Smith, 305; *Filkins v. Whyland*, 24 Barb. 379; *Knight v. Knight*, 28 Ga. 165; *Creamer v. Stephenson*, 15 Md. 211; *Taylor v. Galland*, 3 G. Greene, 22.

This distinction has not always been observed, and there are cases against the rule which we now hold. But we think it founded in reason, and sustained by the authorities referred to. Perhaps the case cited from Maryland improperly applies it to a case within the general rule. But if applicable there, it certainly would be to a bill of sale or assignment.

The plaintiff, therefore, would be at liberty to prove and rely

upon these representations as a warranty, although not in the assignment.

The order sustaining the demurrer is reversed, with costs, and the cause remanded for further proceedings.

VENDOR'S REPRESENTATIONS AMOUNT TO WARRANTY, WHEN: See extended note to *Sekras v. Woods*, 2 Am. Dec. 220, 221. A false representation respecting title, where the vendee relies upon it, is actionable: See note to *Bostwick v. Lewis*, 2 Id. 79.

WILLFUL MISREPRESENTATION OF QUALITY IS NOT SUFFICIENT TO AVOID SALE OF PERSONAL PROPERTY, unless the defendant was deceived by it, and unless it formed an inducement to him to make the purchase: *President etc. of Connersville v. Wadleigh*, 41 Am. Dec. 214. To constitute fraud, it is not only necessary that representation should be untrue, but also that the party making it should know it to be so at the time it was made: *Campbell v. Hillman*, 61 Id. 195. As to distinction between warranty and fraud in sale, see *Bartholomew v. Bushnell*, 52 Id. 338.

WRITTEN CONTRACT IS PRESUMED TO CONTAIN AGREEMENT BETWEEN PARTIES, AND PAROL EVIDENCE IS INADMISSIBLE to show that other things were agreed to at the time of its execution: *Richardson v. Maine Ins. Co.*, 74 Am. Dec. 459; *Conner v. Clark*, 73 Id. 529; *Palmer v. Fogg*, 58 Id. 708, and notes to these cases.

PAROL EVIDENCE OF WARRANTY of quantity of land conveyed by deed is inadmissible as tending to vary the terms of the instrument: *Cook v. Combs*, 75 Am. Dec. 241.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Parol evidence cannot be admitted to alter, vary, or control a written contract, nor to annex thereto a condition or defeasance not appearing on the contract itself; but it is competent to show a total or partial failure of the consideration of a note or other written contract; or where only a part of the contract is reduced to writing, to prove the portion which the parties have allowed to rest in parol; or to contradict a mere receipt which does not purport to contain the contract out of which it arose; or to show the manner in which, or the fund out of which, a note or obligation is to be paid, provided it does not vary the contract expressed in the writing; or to show a consideration different from that expressed in the writing; or to prove the oral agreement of the parties, if the writing does not profess to state it, but is made merely for the purpose of passing title pursuant to the agreement. The purposes constitute an exception to the general rule above stated; but parol evidence is received in such cases, on the ground that the agreement to which it relates has not been reduced to writing. But of course, if the parties have reduced their contract, and the whole of it, to writing, and the instrument is free from ambiguity or uncertainty, the courts will exclude parol testimony to vary its terms: *Hubbard v. Marshall*, 50 Wis. 326, holding parol proof of a contemporaneous oral agreement to be inadmissible. A parol agreement collateral to and distinct from a written contract between the same parties, and made in consideration of the execution of the writing, may be valid: *Welz v. Rhodius*, 87 Ind. 8. Any assertion or affirmation made by the seller to the purchaser during the negotiations to effect the sale, respecting the quality of the article or the efficiency of the machine sold, will be regarded as a warranty if relied upon by the purchaser in making

the purchase: *Neave v. Arntz*, 56 Wis. 176. Where property is transferred by a written instrument which is in effect a mere bill of sale, expressing the consideration, and providing that until payment the title shall remain in the vendor, a prior oral warranty and representations made as an inducement to the purchaser may be shown. And in an action for the purchase price, allegations of such warranty and breaches thereof constitute a good counterclaim: *Red Wing Mfg. Co. v. Moe*, 62 Id. 243.

FITZSIMMONS v. CITY FIRE INSURANCE COMPANY OF NEW HAVEN.

[18 WISCONSIN, 234.]

INSURANCE COMPANY IS BOUND TO PAY ITS RATABLE SHARE OF LOSS, AND CAN DERIVE NO BENEFIT FROM EXCESS OF PAYMENT MADE BY ANOTHER COMPANY. Where property is insured in several fire insurance companies, and each policy contains a clause that in case of loss the assured shall not be entitled to receive of the company issuing such policy any greater proportion of the loss than the amount insured by such policy bears to the whole amount insured upon the property, the companies are all and each liable to pay the ratable portion mentioned in the clause, though it might happen that some had paid more than their share, and even enough to cover the whole loss or damage sustained by the assured.

SAME—NO CONTRIBUTION UNDER SUCH CLAUSE.—If one of the companies pays more than its ratable share of loss under such a clause, it cannot claim contribution from others which have not paid their share, but must enforce its remedy, if it have any, against the assured.

PLEA WHICH PROFESSED IN ITS COMMENCEMENT TO ANSWER WHOLE CAUSE OF ACTION, and afterwards answered only a part, was bad under the old system of pleading as well as under the code.

PARTIAL DEFENSE TO ACTION SHOULD BE SET UP AND RELIED ON AS SUCH, and not as a complete and entire defense.

ANSWER WHICH PROFESSES AND ASSUMES TO ANSWER ENTIRE CAUSE OF ACTION IS BAD on demurrer, where the facts alleged constitute only a partial defense to the action.

THAT INSURANCE POLICY IS VOID BECAUSE ISSUED CONTRARY TO LAW IS PROPER MATTER OF DEFENSE.

PRESUMPTION IS THAT FOREIGN INSURANCE COMPANIES HAVE COMPLIED WITH LAWS of the state in which they have effected insurance.

COMPLAINT ON FIRE POLICY ISSUED BY FOREIGN INSURANCE COMPANY NEED CONTAIN NO ALLEGATION that the defendant has complied with the statute requiring such companies to file certain statements under oath with the secretary of state, and obtain his certificate of authority to transact business, etc.

ACTION upon an insurance policy. The policy covered a stock of hardware, etc., to the extent of two thousand dollars. It was substantially alleged in the complaint that the loss to the plaintiff from the destruction by fire of the property in-

insured was \$9,127.84; that he had fulfilled all the conditions of the policy, and had demanded payment of the amount insured by the defendant, but that the same had not been paid. The complaint therefore demanded judgment for said sum of two thousand dollars. The policy of insurance was annexed to the complaint, and contained the following clause: "In case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or receive of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on said property." The answer denied most of the material allegations of the complaint, and averred that the defendant, at the time of the loss, had other insurances on the property covered by the policy sued on, to wit: two thousand dollars in the New England Fire and Marine Insurance Company, two thousand dollars in the Phoenix Insurance Company, and two thousand dollars in the City Fire Insurance Company of Hartford. It then proceeded: "And for a further answer, the defendant shows that the actual loss and damage which the plaintiff sustained did not exceed the sum of two thousand seven hundred dollars, the whole of which sum has been paid to him by the said other insurance companies before the commencement of this suit, . . . to apply upon his said loss and damage." The amount paid by each company was also specified. The answer, after stating the several defenses relied on, demanded judgment, that the policy sued on be delivered up to be canceled, and for costs. The plaintiff demurred to that portion of the answer above quoted, as not stating a defense to the action. The demurrer was sustained, and the defendant appealed.

M. A. Edmonds, for the appellant.

Whittemore and Weisbrod, for the respondent.

By Court, COLE, J. We consider the portion of the answer demurred to as clearly insufficient in setting forth a complete defense to the action, for reasons which were anticipated by the counsel for the appellant. The policy declared on contains the clause that "in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in any case of loss or damage, be entitled to demand or receive of this company any

greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on said property." Now, if all the policies contained a similar clause, then it is very clear that the principle of contribution would not apply to the companies if either should pay more than its proper proportion of the loss. Nor could one company, under such circumstances, derive any benefit from an excess of payment made by another company. For it is very evident that if one company should pay more than its ratable portion of the loss, it would be a matter solely between itself and the assured, and it could not call upon the other companies to contribute. This would seem to be the irresistible inference in construing such stipulations. But we are not without authority upon the point. In *Lucas v. Jefferson Ins. Co.*, 6 Cow. 635, this direct question was presented, and the court held that where several policies contained such a clause the companies were all and each liable to pay the ratable portion mentioned in the clause, though it might happen that some had paid more than their share, and even enough to cover the whole loss or damage sustained by the assured. For the court say that if, notwithstanding such a clause, one company voluntarily pays the whole amount of its subscription toward the plaintiff's loss, and in excess of its ratable share, yet it could not for that reason claim contribution of the other companies upon any ground; that the answer to such a claim would be, that it had paid in its own wrong, and its redress must be against the assured, who had received more than he was entitled to demand. A company might naturally pay more than a party could recover rather than incur the expense and trouble of litigation. And if it should, there would be no justice or equity in holding that some other company might take advantage of such payment and apply it in discharge of its just share of the loss. For these obvious reasons the appellant cannot derive any benefit from the payments made by the other companies. If, on the contrary, there was a double insurance, so that the principle of contribution would apply, it was the duty of the appellant to so allege in the answer in order to make the defense available.

Again, the appellant contends that if the answer is not sufficient as a total defense, it is good as a partial defense to the action. But the difficulty with this position is, that this portion of the answer professes and assumes to answer the entire cause of action. It is not relied on as a partial, but as a complete, defense; and we have seen that for this purpose it

is insufficient. Now, under the old system, where a plea professed in its commencement to answer the whole cause of action, and afterwards answered only a part, the whole plea was bad. This rule was elementary; and upon general principles, we do not see why it is not applicable to pleadings under the code. If a party has a partial defense to an action, he should set it up and rely on it as such, and not as a complete and entire defense.

It is further claimed that it was incumbent on the plaintiff to state in the complaint that, before issuing the policy sued on, the defendant had complied with the laws of this state requiring foreign insurance companies to make and file certain statements with the secretary of state, and obtain his certificate of authority, etc.: See Laws of 1859, c. 190. We do not think such an averment necessary. If the policy is void because issued contrary to law, it is a proper matter of defense. It is not fair to assume that the company, in the transaction of its business, has been violating the laws of this state, but the contrary presumption arises.

We think the demurrer was properly sustained, and the order of the circuit court is therefore affirmed.

LIABILITIES OF SUCCESSIVE INSURERS: See extended note to *Alliance etc. As. Co. v. Louisiana Ins. Co.*, 28 Am. Dec. 121, 125, citing the principal case on page 122.

CONTRIBUTION BETWEEN SUCCESSIVE INSURERS OF SAME PROPERTY: See *Millandon v. Western M. & F. Ins. Co.*, 29 Am. Dec. 433; note to *Alliance etc. As. Co. v. Louisiana Ins. Co.*, 28 Id. 121.

CONSTRUCTION OF CLAUSE IN POLICY OF INSURANCE RESTRICTING LIABILITY TO RATABLE PROPORTION OF ANY LOSS THAT MAY OCCUR: *Millandon v. Western M. & F. Ins. Co.*, 29 Am. Dec. 433; note to *Alliance etc. As. Co. v. Louisiana Ins. Co.*, 28 Id. 122.

PLEA MUST ANSWER ALL IT PROFESSES TO ANSWER. If it purports to answer the whole declaration, and answers but a part, it is bad on demurrer: *Goodrich v. Reynolds*, 83 Am. Dec. 240, and cases cited in note thereto 243. Plea which is bad in part is bad *in toto*: *Ferrall v. Bradford*, 50 Id. 293. But compare *Brantley v. Thomas*, 73 Id. 264.

CITATIONS OF PRINCIPAL CASE. — Open policies insuring property which may hereafter arise, or insuring future material productions in course of the industry of the assured, are not wager policies, and valid. The convenience of business requires such insurance, and open policies of that character are constantly upheld to cover subsequent purchases of goods: *Sawyer v. Dodge Co. Mut. Ins. Co.*, 37 Wis. 544. A general denial puts in issue every material averment in the complaint which may be denied in that manner, although there may be other material averments therein not specifically denied, and not reached by the general denial. And the principal case does not conflict with this rule, for the question as to the effect of a general denial was not in that case: *Collart v. Fisk*, 38 Id. 243.

FAIRBANKS v. WITTER.

[18 WISCONSIN, 287.]

EVIDENCE AS TO VALUE OF SERVICES OF COUNSEL, or the amount of other expenses incident to the prosecution of an action of trespass, or on the case for a tort, is inadmissible for the purpose of laying a foundation for those particulars as items of damage.

JURY CANNOT TAKE INTO ACCOUNT VALUE OF SERVICES OF COUNSEL, or other expenses incident to the prosecution of an action of trespass, or on the case for a tort, in assessing damages, either actual or punitive.

VERDICT OF JURY WHICH INCLUDES VALUE OF SERVICES OF COUNSEL, or other expenses incident to the prosecution of an action of trespass, or on the case for a tort, is irregular and erroneous.

EVIDENCE OF PRIOR THREATS, ETC., IS ADMISSIBLE IN MITIGATION OF DAMAGES IN ACTION FOR TRESPASS TO PERSON. Where such trespass was committed in an affray, the defendant may show, in mitigation of damages, that the plaintiff, during several years before the affray, had frequently tried to provoke a quarrel with him; had on various occasions threatened to take his life; that some of these threats were made to defendant himself; and that all of them had been brought to his knowledge before the affray.

ACTION for damages for an assault upon the plaintiff, by which his arm was broken, and other injuries inflicted. Defendant answered that the acts complained of were in justifiable self-defense. Plaintiff, after introducing evidence as to the nature and circumstances of the assault, called Judge Ferris as a witness, and asked him, "What, in your judgment, is a fair compensation to a lawyer for bringing and prosecuting this action?" An objection was made to the question, but it was overruled, and the witness answered, "About fifty dollars." Defendant, after introducing evidence as to the circumstances attending the infliction of the injury complained of, offered evidence to show that the plaintiff, at different times, and frequently for several years previous to the affray in question, had tried to provoke quarrels with the defendant; that he had threatened on various occasions to take his life; that some of these threats were made to the defendant himself; and that all of them were brought to his knowledge prior to the time of such affray. The evidence, however, was ruled out. Verdict for plaintiff for five hundred dollars damages; motion for new trial overruled; judgment upon the verdict; and the defendant appealed.

G. C. Prentiss and S. U. Pinney, for the appellant.

Otis B. Lapham, for the appellee.

By Court, COLE, J. The first error assigned here is that which relates to the admission of the evidence of the witness Ferris. He was asked upon the trial, and stated under objection, what he thought was a fair compensation to a lawyer to bring and prosecute the action. The object of this evidence cannot be mistaken. It was offered with the evident purpose of laying the foundation of a claim for counsel fees in conducting the suit, as a particular item of damages, and which the jury might take into consideration in fixing the amount the respondent was entitled to recover. And the question is, Had the jury the right to include in their estimate of damages proper compensation to a lawyer for prosecuting the suit? If they had not, then it is manifest that all testimony upon that point should have been excluded on that ground. The counsel for the respondent has not referred us to any case which decides that counsel fees, or proper compensation to a lawyer for prosecuting the action, aside from the taxed costs, might be taken into consideration by the jury in assessing damages. On the contrary, the following authorities expressly hold that no claim of that kind is admissible, and that if such items of expense are included by the jury in their verdict, it is irregular and erroneous: *Day v. Woodworth*, 13 How. 363; *Barnard v. Poor*, 21 Pick. 378; *Hicks v. Foster*, 13 Barb. 663; *Lincoln v. Schenectady and Saratoga R. R. Co.*, 23 Wend. 425.

In *Day v. Woodworth*, 13 How. 363, Justice Grier remarks that the doctrine about the right of the jury to include in their verdict in certain cases a sum sufficient to indemnify the plaintiff for counsel fees and other real or supposed expenses over and above taxed costs, seems to have been borrowed from the civil law and the practice of courts of admiralty. He goes on to remark, after giving the origin of costs *de incremento*, or the taxed costs which the successful party was permitted to recover by way of amends for his expense and trouble in prosecuting the action, that the jury neither at common law nor by statute could allow counsel fees and expenses as a part of the actual damages: p. 372. The opinions of the court in the other cases are equally emphatic, and fully vindicate the soundness of the doctrine that the jury have no right to include in their verdict counsel fees and the other expenses of litigation. Nor does it make any difference or change the rule, that the action is one where punitive damages may be given. For if the expenses of litigation, counsel fees, etc., may be assessed by the jury, it is very clear that it must be

upon the principle that they are consequential damages, and relate to the amount of compensation rather than refer to damages which may be inflicted by way of penalty or punishment for aggravated misconduct. The question put was, What, in the judgment of the witness, was a fair compensation to a lawyer for prosecuting the action? This shows most conclusively that the party rested his claim for counsel fees upon the ground of compensation, recompense, or satisfaction for expenses incurred, and not upon the ground that the action was one in which vindictive and exemplary damages might be given. But in any view, we think the jury had no right to assess counsel fees as a part of the damages, particularly in this state, where we have a statute regulating the costs and fees which the successful party may recover, and which is applicable to this as well as other cases: See c. 133, secs. 38 et seq.

Another error assigned is, that the court improperly excluded testimony offered tending to show that the plaintiff, at different times and frequently for several years previous to the affray, had tried to provoke quarrels with the defendant, and had threatened on various occasions to take his life, some of which threats were made to the defendant, and all of which were brought to his knowledge prior to the time of the affray. It is claimed that, under the facts and circumstances of this case, this evidence was admissible in mitigation of damages, because it tended to show that the defendant's conduct was not wanton or unprovoked, and had a material bearing upon his intention, and whether he had reasonable ground to apprehend danger. Although the question is not free from doubt in my own mind, under the authorities, yet my brethren are clear that the evidence was competent for the purpose for which it was offered. It appears from the proofs that the affray occurred in and near a highway which crosses the land of the defendant. The plaintiff was passing along the highway with a team and load of wood, and when near the defendant's gate opening into the highway, he saw the defendant, stopped his team, and had some conversation about a sluice-way at that crossing. It seems that angry words passed about the sluice-way, and the lie was given. There is a conflict of testimony as to who first gave the lie. The plaintiff got off his wagon, and went towards the defendant, evidently for the purpose of having a fight. The defendant ran to his wagon, standing near by, got a pitchfork, and returned to meet the plaintiff, and

after some motions, struck him a blow on the arm, which produced the injury complained of. These appear to be the leading facts attending the affray, as nearly as one can gather them from the conflicting statements of the witnesses. Now, it is argued that if there was some old grudge between the parties, or the plaintiff had on various occasions tried to provoke quarrels with the defendant, and had threatened to take his life, the defendant might reasonably have supposed, after what had passed between them, on seeing the plaintiff get down from his wagon and advance towards him in a threatening manner, that he was about to inflict some great personal injury upon him. It is said that under such circumstances the defendant might naturally and reasonably have supposed that he was in some great personal danger, and have struck a severer blow than he otherwise would, to disable his assailant; and that the jury, when they came to determine the just measure of punishment that should be inflicted upon him by way of example for his misconduct, should know and consider the previous relations of the parties, their acts and declarations, since they were connected with and in some measure provoked the particular trespass complained of. There is very great force in this view of the matter, and though not without some doubt upon the point, yet I am inclined to the opinion that the evidence should have been admitted in mitigation of damages. The following cases will be found to have a strong bearing upon the question, and show that the evidence was competent for that purpose: *Dean v. Horton*, 2 McMull. 147; *Sledge v. Pope*, 2 Hayw. (N. C.) 607; *Rhodes v. Bunch*, 3 McCord, 36; *McKenzie v. Allen*, 3 Strob. 546; *Waters v. Brown*, 3 A. K. Marsh. 1336. These previous facts and declarations of the parties relate directly to the very affray, and conduce strongly to explain the acts of each party and the motive with which each acted. Upon this ground we think the evidence admissible.

It follows from these views that the judgment of the circuit court must be reversed, and a new trial ordered.

ADMISSIBILITY OF EVIDENCE AS TO PROVOCATION TO MITIGATE DAMAGES IN ACTION FOR ASSAULT AND BATTERY: *Fullerton v. Warrick*, 25 Am. Dec. 99; *Jacaway v. Dula*, 27 Id. 492, and note 493; *Rawlings v. Commonwealth*, 19 Id. 757; *Lee v. Woolsey*, 10 Id. 230.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: In an action for libel the jury may, in estimating compensatory damages, allow to the plaintiff reasonable counsel fees in the prosecution of his action, although there may be circumstances of mitigation not

amounting to a justification: *Finney v. Smith*, 31 Ohio St. 534. So in an action to recover damages for a malicious personal injury, the jury may allow a reasonable fee to plaintiff for the services of her attorney in the action; but such allowance, and the amount thereof, rest in the discretion of the jury, to be determined under all the circumstances of the case, and neither party can call witnesses to prove the value of such services: *Stevenson v. Morris*, 37 Id. 21. The logical deduction from the Ohio cases and the principal case is, that the jury allow such fees on the principle that they are in the nature of expenses incurred, and therefore as compensation rather than as a penalty: See case last cited. But while the principal case was alluded to in *Howell v. Scoggins*, 48 Cal. 357, it was there held that in an action for an assault and battery the jury, in estimating the damages, could not take into consideration the plaintiff's expenses in the prosecution of the suit.

ACHTENHAGEN v. CITY OF WATERTOWN.

[18 WISCONSIN, 331.]

PLAINTIFF, IN ACTION FOR INJURY SUSTAINED BY ANOTHER'S NEGLIGENCE IS ONLY REQUIRED to establish a *prima facie* case that the injury was occasioned by defendant's negligence.

PLAINTIFF IN ACTION FOR INJURY SUSTAINED BY ANOTHER'S NEGLIGENCE IS NOT BOUND, in the first instance, to show that he himself was not guilty of contributory negligence.

WHERE PLAINTIFF'S OWN EVIDENCE IN ACTION FOR INJURY SUSTAINED BY ANOTHER'S NEGLIGENCE raises an inference of negligence against himself, he must, in order to establish a *prima facie* case, show that he was guilty of no negligence.

PRESUMPTION OF CONTRIBUTORY NEGLIGENCE MUST BE NEGATIVED TO AVOID NONSUIT, WHEN. — Presumption of negligence on part of deceased is raised in an action against a municipal corporation for damages arising from negligence in leaving a bridge unrepaired, in consequence of which the plaintiff's son fell through and was drowned, where it appears from the plaintiff's own evidence that the deceased was thirteen years old, that he was familiar with the bridge, that he knew of the hole in it, that the accident occurred in the daytime, and that he had passed over the bridge a short time before on the same day. The plaintiff is bound to negative this presumption, or he will be nonsuited.

ACTION by plaintiff, as administrator of the estate of Otto Achtenhagen, deceased, to recover damages from the city named as defendant, under the statute providing therefor in cases of negligence causing death: See R. S. Wis., c. 135, secs. 12, 13. The cause of action alleged was, that the plaintiff's intestate, who was also his son and an infant, while passing over a bridge across Rock River, within the corporate limits of Watertown, fell through a large hole in said bridge and was drowned, without any negligence on his part, and wholly in consequence of the negligence of the defendant in not keeping

said bridge in repair as it was bound to do. Defendant interposed a general denial, except as to its duty to keep said bridge in repair. The plaintiff on the trial, and after having proved his representative character, testified in his own behalf substantially as follows: "My son Otto Achtenhagen died June 2, 1862. His mother sent him across the Second Street bridge to get butter and eggs of one Mrs. Otto. I live about five hundred steps south of the bridge, and Mrs. Otto a few steps north of it. A little brother went with him. I have not seen him alive since that time. His body was found near the Main Street bridge, in Rock River, below the Second Street bridge. His body was taken out of the river June 6, 1862. He looked very natural, except that his face was swollen up, and he had a scar over the eye. The scar looked as though his forehead had been hit against the sharp corner of something. I heard about the accident immediately after it happened. I went back to the bridge with my little son who was with Otto, and he pointed out the hole where Otto, he said, fell through the bridge. There was a plank out. The hole was about fifteen or sixteen inches in breadth, and about ten feet long, or one half the width of the bridge. It was a double-track bridge. Otto was thirteen years old when he died. He frequently passed over the bridge." Mrs. Schmiel, a witness for the plaintiff, testified that on the day of the accident she saw the deceased near the north end of the bridge, and spoke to him, that he was going home, that he had eggs and butter on one arm, and that he was leading his little brother with the other hand. About half an hour afterwards she heard that he was drowned. Evidence was also introduced on the part of the plaintiff tending to prove that the hole through which the deceased had fallen had been in the bridge several days before the accident occurred. The court, upon defendant's motion, directed a judgment of nonsuit to be entered, and the plaintiff sued out his writ of error.

Gill and Barber, for the plaintiff in error.

Enos and Hall, for the defendant in error.

By Court, DIXON, C. J. Adhering to the rule given in *Milwaukee and Chicago R. R. Co. v. Hunter*, 11 Wis. 160 [78 Am. Dec. 699], that the plaintiff in an action for injury sustained by the negligence of another is not bound in the first instance to show that he himself was not guilty of negligence which

contributed to the injury, but that it is enough if the proof introduced, and the circumstances attending the injury, establish *prima facie* that the injury was occasioned by the negligence of the defendant, still we think the nonsuit properly granted in this case. If the plaintiff's own evidence raises an inference of negligence against himself, then he is undoubtedly required to go further, and in order to establish a *prima facie* case, to show that he was guilty of no negligence. Such, in our opinion, was the case here. The deceased was a person of sufficient discretion, knowing the danger, with ordinary care, to have avoided it, and if he did not, but came to his death in the manner supposed, it cannot but in some degree be attributed to his own want of proper care. He was a boy of the age of thirteen years. He was familiar with the bridge, and knew of the hole in it through which it is supposed he must have fallen and lost his life. He was passing over it in the daytime, and had passed over it but a short time before on the same day. These circumstances raise such a presumption of negligence against him, that we think the plaintiff was bound by proper proof to negative the presumption, and to show that the deceased was guilty of no want of care, before the cause could have been submitted to the jury.

Judgment affirmed.

BURDEN OF PROOF OF CONTRIBUTORY NEGLIGENCE: See note to *Lucas v. New Bedford etc. R. R. Co.*, 66 Am. Dec. 410; note to *New Orleans etc. R. R. Co. v. Allbritton*, 75 Id. 106; *Johnson v. Hudson River R. R. Co.*, 75 Id. 375, and numerous cases cited in note thereto 383; *McCully v. Clarke*, 80 Id. 584; *Gahagan v. Boston etc. R. R. Co.*, 79 Id. 724. Plaintiff must make out *prima facie* case as he charges it: *Winston v. Taylor*, 75 Id. 112. While the plaintiff must be free from fault, he need not show such fact affirmatively in the first instance, but the absence of fault on his part may be inferred from circumstances: See numerous cases cited in note to *Johnson v. Hudson River R. R. Co.*, 75 Id. 383.

RULE THAT BURDEN IS UPON PLAINTIFF TO DISPROVE NEGLIGENCE ON HIS PART IS DOUBTED in *Milwaukee etc. R. R. Co. v. Hunter*, 78 Am. Dec. 699. In the note to this case, p. 706, the rule in Wisconsin is stated, and the principal case cited.

PRESUMPTION IS AGAINST CONTRIBUTORY NEGLIGENCE where there is nothing in plaintiff's evidence tending to show it, and the burden of proof is upon the defendant: See note to *Milwaukee etc. R. R. Co. v. Hunter*, 78 Am. Dec. 706.

PLAINTIFF WILL BE NONSUITED if contributory negligence conclusively appears from his own evidence, but if the evidence merely tends to show such negligence, the question will be for the jury: See note to *Milwaukee etc. R. R. Co. v. Hunter*, 78 Am. Dec. 706; *Todd v. Old Colony etc. R. R. Co.*, 83 Id. 679, and note 680.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Party cannot recover for an injury of which his own negligence was in whole or in part the proximate cause: *Cunningham v. Lyness*, 22 Wis. 248. It is only where there is an entire absence of evidence tending to establish the case, or where the negligence of the party injured or killed is affirmatively and clearly proved by the plaintiff, so as to admit of no doubt or controversy, that a nonsuit may properly be ordered: *Langhoff v. Milwaukee etc. R'y Co.*, 19 Id. 497; *Dorsey v. Phillips etc. Co.*, 42 Id. 600. If the evidence introduced by the plaintiff himself shows that his negligence concurred with that of the defendant to produce the injury complained of, there would surely be no propriety in submitting such a case to the jury. The jury in that case have no duty to perform, and the court must decide on a motion for a nonsuit as a question of law: *Delaney v. Milwaukee etc. R'y Co.*, 33 Id. 72. Unless, however, the testimony shows conclusively that the negligence of the plaintiff contributes directly to the injury of which he complains, the question of negligence is one for the jury, and the court is not justified in taking the case into its own hands and nonsuiting the plaintiff: *Pitzner v. Shinnick*, 39 Id. 137; *Gower v. Chicago etc. R'y Co.*, 45 Id. 184; *Perkins v. City of Fond du Lac*, 34 Id. 440. The question as to whether negligence may be inferred or presumed as a question of law seems to trouble the courts of Wisconsin, and while they have not expressly overruled the doctrine of the principal case in that particular, they are not disposed to extend in that respect: *Perkins v. City of Fond du Lac*, 34 Id. 440. In fact, Dixon, C. J., in *Barstow v. City of Berlin*, 34 Id. 362, said: "But I desire to say of the Achtenhagen case, that, although I prepared the opinion, and thought the decision correct at the time, it has given me much trouble, and I have frequently had great doubts about its correctness when considering the same question since. My fear is that the court was wrong in saying, as matter of law, that the fact that plaintiff's intestate fell through the hole raised an inference of negligence against the intestate, which the plaintiff was required to repel or overcome by additional proof in order to establish a cause of action. How could the court say, as matter of law, that the fall of the boy through the hole was not without fault or negligence on his part, or that it was not purely accidental, or under circumstances in which no blame could attach to him? How could it say, as an inference drawn by the law, that his attention was not suddenly and inexcusably diverted about the time he reached the hole, and that his fall was not produced in that or in some similar blameless or innocent way? Negligence, like fraud, is not to be presumed, but must be proved, or at least there must be some facts upon which to base the inference. I agree that the inference might have been upheld upon the facts of that case, but it seems to me that it was an inference of fact, and not of law, and so, one to have been drawn by the jury, and not by the court." Cole, J., however, in *Barstow v. City of Berlin*, *supra*, p. 363, thought it, for the purposes of the appeal in that case, unnecessary to disturb the principal one, as the two cases were distinguishable. Dixon, C. J., in the principal case, seemed to concede that the rule no longer prevailed in Wisconsin, that in an action for injuries caused by negligence the burden is upon the plaintiff to show himself free from contributory fault: *Hoyt v. City of Hudson*, 41 Id. 109. In this case, *stare decisis* was considered inapplicable to such a question, and it was held that in such cases where there is nothing in plaintiff's evidence tending to show contributory negligence, the presumption is against it, and the burden of proof is upon the defendant.

WOOD v. CROCKER.

[18 WISCONSIN, 345.]

RAILROAD COMPANY MAY ASSUME DOUBLE CHARACTER OF CARRIER AND WAREHOUSEMAN.

LIABILITY OF RAILROAD COMPANY AS COMMON CARRIER, FOR GOODS TRANSPORTED OVER ITS ROAD, CONTINUES not only until the goods are deposited in the depot or warehouse of the company at the place of destination, but until a reasonable opportunity has been afforded the owner or consignee to take them away.

EXTENT OF "REASONABLE OPPORTUNITY" AFFORDED CONSIGNEE OF GOODS TO TAKE THEM AWAY after carrier's transit has ended is not to be measured by any peculiar circumstances in his own condition and situation rendering it necessary, for his own convenience and accommodation, that he should have a longer time or better opportunity than if he resided in the vicinity of the depot and was prepared with the means and facilities for taking the goods away.

IF CONSIGNEE, AT EARLIEST PRACTICABLE MOMENT, DOES NOT TAKE HIS PROPERTY from possession of common carrier after the transit has ended, he may thereby be deemed to have consented that it should remain in possession of the carrier under the more limited liability of a warehouseman.

FACTS OF THIS CASE SHOW THAT CARRIER, AFTER TRANSIT HAD ENDED, STILL STOOD IN THAT RELATION as to the consignee, and not merely in the relation of a depositary or bailee for hire.

MOSES v. BOSTON AND MAINE RAILROAD, 32 N. H. 523, S. C., 64 AM. DEC. 381, followed and approved.

RULES OF STRICT RESPONSIBILITY WHICH COMMON LAW ATTACHES TO CARRIERS should not be relaxed.

ACTION to recover the value of goods belonging to the plaintiff, and destroyed by fire in the warehouse of the La Crosse and Milwaukee Railroad Company at Portage City, in the state of Wisconsin. Defendant, Crocker, was operating said road, at the time when the damage to the plaintiff accrued, as a receiver appointed by a federal court. Other facts are stated in the opinion. Judgment for plaintiffs, and defendant appealed.

Finches, Lynde, and Miller, for the appellant.

G. C. Prentiss and S. U. Pinney, for the respondents.

By Court, COLE, J. The main question arising upon this record is undoubtedly one of considerable practical importance, as well to railroad carriers as to all those transacting business with them in this state. It is the question as to when the extraordinary liability of a common carrier ceases in respect to goods transported over their roads. Of course, it is perfectly clear that a railroad company may assume the

double character of carrier and warehouseman; but when, as a matter of law, can it be said that the liability of the carrier ends and that of a warehouseman commences? For the appellant it is claimed that when the goods are transported to the place of delivery on the road, and are unloaded from the cars and placed in the depot, then the transit is ended, and the duty or liability of the carrier is discharged; while on the other hand, it is insisted that the liability of the carrier continues, not only until the goods are deposited in the depot or warehouse of the company, but until a reasonable opportunity is afforded the owner or consignee to take them into his possession. Each of these positions is sustained by respectable authority. The leading cases on each side are those of *Norway Plains Co. v. Boston and Maine R. R.*, 1 Gray, 263 [61 Am. Dec. 423], and *Moses v. Boston and Maine R. R.*, 32 N. H. 523 [64 Am. Dec. 381]. These decisions were given upon substantially the same state of facts, and are directly in conflict with each other. As the question has never been decided by this court, we feel at liberty in this condition of the authorities to adopt that rule which appears to be sustained by the sounder reason, and which is more in harmony with those wise maxims of public policy and convenience upon which the common-law liability of the carrier is said to rest. We are therefore disposed to follow the case in New Hampshire, as laying down the better rule, and to hold with that case that the liability of a railroad company as a common carrier, for goods transported over its road, continues until the goods are ready to be delivered at their place of destination on the road, and the owner or consignee has had a reasonable opportunity to take them away. And to prevent all ground for misapprehension upon this point, we will further add, in the language of that case, that the extent of the reasonable opportunity afforded the owner is not to be measured by any peculiar circumstances in his own condition and situation, rendering it necessary, for his own convenience and accommodation, that he should have a longer time or better opportunity than if he resided in the vicinity of the depot, and was prepared with the means and facilities for taking the goods away. This is fairly implied when it is said that the owner is entitled to only a reasonable opportunity to take his property from the possession of the company after the transit is terminated, and if he does not do it at the earliest practicable moment, he may thereby be deemed to have consented that it

should remain in possession of the company under the more limited liability of a warehouseman.

In this case the evidence shows that the goods were transported over the La Crosse and Milwaukee railroad in January, 1863 and reached Portage City, the place of their destination, near sundown, and were taken from the cars and placed in the depot about dark on Saturday night. The depot or warehouse was closed for the night within a few minutes after the goods were put into it. The warehouse was three quarters of a mile from the respondents' place of business. Their cartman had been to the depot for the goods Saturday afternoon about three o'clock, and was told they had not arrived. The cartman says that he was also told by the freight agent that he need not come again that day, as it would be late before the freight train would arrive. He was informed, however, about dusk, that the goods had come, but made no effort to get them, as it was nearly time for the warehouse to close. Before Monday morning the goods, with the depot, were destroyed by fire, but under circumstances, it is contended, which would exonerate the company from liability if it was merely a depository or bailee for hire. But if it still stood in the relation of carrier, then it is conceded it is liable for the loss. That the company did stand in this relation to the property, and that the duty and obligation of a common carrier continued until the respondents had a reasonable time to obtain it, we think is clear.

It is objected that this rule is not sufficiently fixed, definite, and certain to be practical, but that what is a "reasonable time" or "reasonable opportunity" will depend very much upon the circumstances of each case. This may be so, but we still think there will be no serious difficulty in the application of the rule to these business transactions. In cases of vessels engaged in foreign commerce, the question frequently arises whether due and reasonable notice has been given to the consignee so as to afford him a fair opportunity to provide suitable means to remove the goods or put them under proper care and custody. No serious difficulty is experienced in the application of this rule to commercial transportation and delivery. So in many other cases, the question of liability resolves itself into one of diligence, as whether "due and proper care" has been exercised by a bailee, or whether a bill payable at sight or on demand has been presented within a "reasonable time"; or in case of maritime insurance, whether the

abandonment was made in a "reasonable time"; and in many other analogous cases which might be cited, where there is the same uncertainty in respect to the rule as in the case under consideration.

It is doubtless desirable to have all rules of law of a plain, precise, and certain character; but this is not always attainable in human affairs. "The salutary and approved principles of the common law should not be sacrificed to considerations of convenience and expediency"; and that they would be by adopting the rule contended for by the appellant, we think is very clear from the reasoning in the New Hampshire case. Indeed, we are so well satisfied with that case that we need only refer to it for a full expression of our views upon this subject. And in taking leave of that case, and in closing what we deem it necessary to say in respect to the one at bar, we wish to add our cordial approval of a weighty observation there made, that at a time when railroad corporations are almost monopolizing the transportation of property and persons by land, when their business transactions are increasing to such a wonderful extent, and commodities of immense values are daily necessarily intrusted to their charge and control, it would not seem to be the dictate of wisdom to relax the rules of strict responsibility which the common law attaches to carriers.

The judgment of the circuit court is affirmed.

CARRIER'S LIABILITY, AS SUCH, TERMINATES WHEN: *Knowles v. Atlantic etc. R. R. Co.*, 61 Am. Dec. 234; *Norway Plains Co. v. Boston and Maine R. R.*, 61 Id. 423; *Chicago etc. R. R. Co. v. Warren*, 63 Id. 317; *Michigan etc. R. R. Co. v. Day*, 71 Id. 278; *Porter v. Chicago etc. R. R.*, 71 Id. 286; *Marshall v. Am. Ex. Co.*, 73 Id. 381; *Baldwin v. Am. Ex. Co.*, 74 Id. 190; *Bennett v. Byram & Co.*, 75 Id. 90; *Goold v. Chapin*, 75 Id. 398, and notes to these cases, particularly the one to *Porter v. Chicago etc. R. R. Co.*, 71 Id. 290. One class of cases holds that a railroad company's liabilities as common carrier cease when the goods have reached their destination, and are there stored in a warehouse belonging to the company: *Porter v. Chicago etc. R. R. Co.*, 71 Id. 286, and cases cited in note thereto 290; *Norway Plains Co. v. Boston & M. R. R.*, 61 Id. 423; and another class that such liability continues until the owner or consignee has had a reasonable time to remove them: *Morris etc. R. R. Co. v. Ayres*, 80 Id. 215; *Moses v. Boston & M. R. R.*, 64 Id. 381, and notes to these cases. The carrier's liability cannot end until that of the owner, consignee, or warehouseman begins: *Chicago etc. R. R. Co. v. Warren*, 63 Id. 317.

COMMON CARRIER'S LIABILITY AS WAREHOUSEMAN COMMENCES WHEN: See extended note to *Schmidt v. Blood*, 24 Am. Dec. 146-148; note to *Norway Plains Co. v. Boston & M. R. R.*, 61 Id. 432; *Judson v. Western R. R. Corp.*, 81 Id. 718; *Porter v. Chicago etc. R. R. Co.*, 71 Id. 286, and numerous cases

cited in note thereto 290; *Morris etc. R. R. Co. v. Ayres*, 80 Id. 215; *Moses v. Boston & M. R. R.*, 64 Id. 381.

REMOVAL OF GOODS. — Owner of goods transported by railroad must remove them within a reasonable time after they have reached their place of destination: *Morris etc. R. R. Co. v. Ayres*, 80 Am. Dec. 215. The consignee has no power to prolong the carrier's liability, however inconvenient it may be for him to receive the goods: *Marshall v. Am. Ex. Co.*, 73 Id. 381. If the facts show, in that class of cases where the liability of the carrier continues until the consignee has had an opportunity to take the goods away, that the consignee has had no reasonable opportunity to see the goods or take them away before they are destroyed, the transit will be held not to have terminated, and the railroad company will be held liable as carriers for the value of the goods: *Moses v. Boston & M. R. R.*, 64 Id. 381.

THE PRINCIPAL CASE WAS ADHERED TO in *Parker v. Milwaukee etc. R'y Co.*, 30 Wis. 691-693; *Wood v. Milwaukee etc. R'y Co.*, 27 Id. 550; *Lemke v. Chicago etc. R'y Co.*, 39 Id. 455; all sustaining the rule that the consignee has a reasonable time, after goods have reached the point of destination, in which to remove them from defendant's depot. If such time has elapsed, and the goods are ready for delivery, the strict liability of the carrier ceases, without notice of the arrival of the goods being given to the owner or the consignee. And the principal case does not require such notice: *Wood v. Milwaukee etc. R'y Co.*, 27 Id. 553. But some of the cases go further than the principal one, and hold that actual notice must be given to the consignee, if he is accessible, of the arrival of the consignment, and that he is allowed a reasonable time thereafter in which to remove the goods before the extraordinary liability of the carrier, as such, ceases: See cases cited in *Parker v. Milwaukee etc. R'y Co.*, 30 Id. 692. In the case last cited, the court were strongly pressed by the learned counsel to reconsider the principal case, and to hold that, when the transit is ended, and the goods are placed in the depot of the railway company, their strict liability as a common carrier ceases, and that the company thenceforth is only liable as a warehouseman for the safe-keeping of the goods. But the court would not yield from the position taken in the principal case. In *Parker v. Milwaukee etc. R'y Co.*, *supra*, will be found clearly defined the two lines of decisions on this point, and the cases supporting them. A "reasonable time" in which to take goods away is the earliest practicable time after the first carrier is ready to deliver, and is not measured by any peculiar circumstances in the condition of the second carrier, requiring for its convenience that it should have a longer time: *Wood v. Milwaukee etc. R'y Co.*, 27 Id. 541. The principal case was cited in *Hooper v. Chicago etc. R'y Co.*, 27 Id. 92, as giving much support to the rule that, where goods are consigned to a point beyond a railroad company's route, the company is under a continuing liability as carrier until the transfer is made, and that the company will be liable, as carrier, for injuries to the goods received before the transfer is completed.

DOLPH v. RICE.

[18 WISCONSIN, 397.]

COMPLAINT AGAINST DRAWER, IN ACTION UPON BANK CHECK, MUST AVER presentment of the check at the bank, and notice of its dishonor given the drawer, or some fact excusing such presentment and notice.

HOLDER OF BANK CHECK CANNOT RECOVER AGAINST DRAWER WITHOUT PROOF of presentment, dishonor, and notice. These facts, therefore, should be averred in the complaint.

PLAINTIFF, IN ACTION ON BANK CHECK, CANNOT, UNDER ALLEGATION OF DEMAND AND NOTICE, PROVE circumstances dispensing with demand and notice. This he could do under the former rules of pleading, but it is otherwise under the code practice.

ACTION by the payee of a bank check against the drawer. The complaint alleged the making and delivery of the check, and set out a copy of it. It was alleged that on the same day payment thereof was demanded, at the bank on which it was drawn, and refused; and that there was still due and payable thereon the amount specified on its face, with interest from its date. The complaint was demurred to as not stating a cause of action. But the demurrer was overruled, and the defendant appealed.

Peter Yates, for the appellant.

E. Fox Cook, for the respondent.

By Court, **COLE, J.** The simple question arising on this demurrer is, whether, in an action on a bank check, by the holder against the drawer, it is necessary to aver in the complaint presentment to the bank or drawee, and notice of the dishonor to the drawer, or, at all events, allege some facts which show an excuse for not making demand of payment and giving such notice, such as want of funds in the bank on which the check was drawn. There can be no doubt that it would be incumbent on the plaintiff to prove that the check had been duly presented for payment, and notice of dishonor given, in order to recover against the drawer. Upon this point the authorities are distinct and explicit: *Harker v. Anderson*, 21 Wend. 372, and cases there cited. And as it is necessary to prove presentment, dishonor, and notice, it is very apparent that those facts constitute a very material part of the cause of action, and should be averred in the complaint: See *Alder v. Bloomingdale*, 1 Duer, 601; *Edwards on Bills and Promissory Notes*, 666 et seq. It is said by the latter authority, that where an action of *assumpsit* was brought by the

holder, against the drawer of a check payable to bearer, it was held incumbent on the plaintiff to prove that the same had been duly presented for payment, and notice of dishonor given to the drawer. The same rule prevails under the present practice. The payee of a check dishonored on presentment must aver, in an action against the drawer, due presentment to the bank or drawee, and notice of dishonor to the drawer; or must allege facts dispensing with the usual presentment and notice, such as the want of funds in the bank on which the check was drawn. And these allegations must now be made according to the actual transactions. The plaintiff cannot aver demand and notice, and under this allegation prove circumstances dispensing with demand and notice, as he might do under the former rules of pleading": *Edwards on Bills and Promissory Notes*, 667; *Shultz v. Depuy*, 3 Abb. Pr. 252; *Garvey v. Fowler*, 4 Sand. 666-668.

We suppose there was the same necessity for alleging in this complaint presentment and notice that there would be had the action been upon a promissory note against an indorser. In the latter case the indorser would not be liable without demand and notice, and hence these facts must appear in order to show a right to recover. So in the case of a drawer of a bank check, his liability is conditional; it is an undertaking to pay the check, providing it is duly presented to the bank, and payment is refused, and notice of this fact given to him. Therefore it is very obvious that the facts upon which his liability arises should be set forth in the complaint.

We think the complaint was fatally defective, and that the demurrer should have been sustained.

The order of the circuit court overruling the demurrer is reversed, with costs.

KNOX v. WEBSTER.

[18 WISCONSIN, 406.]

EXECUTION CREDITOR HAS NO LIEN UPON PERSONAL PROPERTY OF HIS DEBTOR, under the Wisconsin statute, until it is seized on execution.

EXECUTION LIEN TAKES EFFECT FROM DATE OF LEVY AND BY VIRTUE THEREOF; it is confined to the execution levied, and can have relation to no other.

LIEN CREATED BY SEIZURE OF PROPERTY UNDER EXECUTION IS PRIOR AND SUPERIOR to that of every execution subsequently levied, and cannot be defeated by such subsequent levy, though it is made upon a senior execution.

SHERIFF'S DUTY IS TO LEVY AND SATISFY EXECUTIONS ACCORDING TO THEIR SENIORITY. Having several executions against the property of the same debtor, he must levy the one first placed in his hands. And this rule is not affected by the fact that the junior execution creditor may be more successful than the sheriff in discovering property of the debtor subject to sale on execution.

EXCEPTION SHOULD BE PARTICULAR, where an instruction or conclusion of law is in general correct, but subject, perhaps, to modification in some particulars, not materially affecting its general correctness, so as to call the attention of the court to the precise point of objection.

ACTION to recover from the defendant as sheriff, etc., damages for his failure to levy an execution in his hands issued on a judgment in favor of the plaintiff, Knox, against one Allmeyer, until he had levied upon the property of said Allmeyer another execution alleged to have been placed in his hands subsequently to that in favor of the plaintiff. This was an execution issued to one Cooper, who had obtained a judgment against Allmeyer after the time when the plaintiff's execution was put into the sheriff's hands. At the time plaintiff's execution was issued and placed in the sheriff's hands, Allmeyer was the owner of certain property described in the complaint. Plaintiff stated to the deputy sheriff to whom the execution was delivered, that Allmeyer was the owner of said property, and gave him certain directions as to where he would find the property; but said deputy failed on two successive trials to find it. Within ten days after the plaintiff's execution was placed in the deputy's hands, Cooper, the junior judgment creditor, took said deputy to the place where the property was, and pointed it out to him, claiming that his execution should be first levied on it by reason of his superior diligence in finding it. Thereupon the deputy levied the execution in Cooper's favor on said property, although the plaintiff's execution was still in his hands wholly unsatisfied. The sheriff afterwards advertised the property to be sold on both executions, sold the same, and after retaining his fees, etc., paid over the balance to Cooper on his execution, returning the plaintiff's execution wholly unsatisfied. After the delivery of plaintiff's execution to defendant, Allmeyer had no property out of which the same could be made, except that above mentioned, the value of which at the time of the levy and sale was two hundred dollars. Defendant offered in evidence the record and proceedings in the case of *Knox v. Allmeyer*, the same having been set up in his answer as a defense. This record showed that the plaintiff, Knox, upon affidavit showing substantially the above

facts, had moved the court in that cause to direct the defendant, as sheriff, to pay over to him, instead of Cooper, the amount for which said property of Allmeyer was sold at said execution sale, and that the motion had been denied. The plaintiff objected to the evidence as immaterial, and the objection was sustained. The court below found, as conclusions of law, that the defendant, by omitting to levy the plaintiff's execution on said property until after he had levied that of Cooper, was guilty of neglect of official duty, and was bound to compensate the plaintiff for the damages he had thereby sustained; and that the plaintiff had sustained damages thereby in the sum of two hundred dollars, the value of the property, and interest thereon from the day of said sale. Defendant excepted generally to both these conclusions of law. Judgment in accordance with the finding, from which the defendant appealed.

Butler and Cottrill, for the appellant.

Thomas M. Knox, pro se.

By Court, DIXON, C. J. "Personal property shall be bound from the time of its seizure on execution": R. S., c. 134, sec. 18. Before seizure there is no lien,—nothing by which the rights of different execution creditors, whether senior or junior, can attach. The lien takes effect from the date of the levy and by virtue thereof, and of course is confined to the execution levied, and can have relation to no other. Such lien is prior and superior to that of every execution subsequently levied, and consequently not liable to be defeated by such subsequent levy, though made upon a senior execution. This point, if not decided, was strongly intimated in *Russell v. Lawton*, 14 Wis. 209 [80 Am. Dec. 769]. It follows that the court was right in rejecting the record and proceedings upon the motion to have the money made on Cooper's execution applied on that of the plaintiff. The court had no power to make such application, and was bound to deny the motion. The plaintiff having wholly mistaken his remedy, the decision upon the motion was no bar to this suit, and that was the only purpose for which the record and proceedings were offered.

As to the duty of the sheriff in making the levy, we are satisfied he should have levied the senior execution first. The decision in *Russell v. Lawton*, 14 Wis. 209 [80 Am. Dec. 769], proceeded on this supposition in all cases where the several executions are in the hands of the same officer. The statute, sec-

tion 15, requires the sheriff, under the sanction of his official oath, to indorse upon every execution the year, month, day, and hour of the day when he received the same. No reason is perceived for this, unless it be to furnish unequivocal and satisfactory evidence upon which to determine disputed questions of priority and preference among different execution creditors of the same debtor, and to enable the sheriff to guard against mistakes. He is a public officer, of whom the law requires the strictest impartiality between those who are obliged to have his services, and this impartiality cannot be enforced except upon the rule that he must, at his peril, levy and satisfy executions according to their seniority in his hands. Once allow it to be a race of diligence between the different creditors in finding and pointing out the property of the debtor, and what a door to partiality, fraud, and strife would be opened! The sheriff might neglect inquiry, or be willfully ignorant, for the sake of favoring one or oppressing another creditor, and the whole controversy would be thrown upon the uncertain testimony of interested and suspicious witnesses. We do not doubt, therefore, that it was the intention of the legislature, as it is the course of reason, that executions should be levied according to seniority, and that the sheriff in this case was not justified in levying the junior execution first because the creditor in that execution had been more successful than himself in finding the property of the execution debtor.

The question of deducting the sheriff's fees from the value of the property as found by the court was not made at the trial, and is not presented by the exceptions. The exception to the third conclusion of law is too general for this purpose. Where an instruction or conclusion of law is in general correct, but subject, perhaps, to modification in some particular or particulars not materially affecting its general correctness, the exception should be particular, so as to call the attention of the court to the precise point of objection: *Pilling v. Otis*, 13 Wis. 495; *Lachner v. Salomon*, 9 Id. 129.

Judgment affirmed.

EXECUTION CREDITOR HAS NO LIEN UPON PERSONAL PROPERTY UNTIL LEVY: *Johnson v. Gorham*, 65 Am. Dec. 501, and collected cases in note thereto 503; other cases hold that the lien of an execution attaches to the defendant's property immediately upon the delivery of the writ to the sheriff. *Millon v. Riley*, 25 Id. 149, and note 154; *Collingsworth v. Horn*, 24 Id. 753; *Beals v. Allen*, 9 Id. 221; *Haggerty v. Wilber*, 8 Id. 321; *Oresson v. Stout*, 8

Id. 373; and at common law a *fiery facias* bound the defendant's goods from the date of its *teste*; *Jones v. Jones*, 18 Id. 327; note to *Hanson v. Barnes' Lessee*, 22 Id. 328; note to *Farley v. Lea*, 32 Id. 683; note to *Davis v. Oswald*, 68 Id. 186; note to *Million v. Riley*, 25 Id. 154.

EXECUTIONS AGAINST SAME DEBTOR, HOW TO BE LEVIED AND SATISFIED ACCORDING TO PRIORITY OF DATE AND DELIVERY: See *Palmer v. Clarke*, 21 Am. Dec. 340; *Lynn v. Gridley*, 12 Id. 591; *Green v. Johnson*, 11 Id. 763; note to *Johnson v. Ball*, 24 Id. 453; *Million v. Commonwealth*, 36 Id. 580, and collected cases in note 583; *Russell v. Lawton*, 80 Id. 769. Execution first received by officer having several executions against the same defendant placed in his hands at different times must be first levied and paid: *Million v. Commonwealth*, 36 Id. 580; *Tabb v. Harris*, 7 Id. 732; *Johnson v. Gorham*, 65 Id. 501; *Rudy v. Commonwealth*, 78 Id. 330.

GENERAL EXCEPTION TO CHARGE CONTAINING SEVERAL DISTINCT PROPOSITIONS must be disregarded unless all the propositions are erroneous: See numerous cases cited in extended note to *Haggart v. Morgan*, 55 Am. Dec. 354; *Hart v. Rensselaer etc. R. R. Co.*, 59 Id. 447; note to *Milwaukee etc. R. R. Co. v. Hunter*, 78 Id. 706.

THE PRINCIPAL CASE WAS CITED in *Ohlson v. Pierce*, 55 Wis. 213, to the point that where a sheriff, having in his hands two executions in favor of different creditors against property of the same debtor, and having in his power property known by him to belong to such debtor, and subject to levy, is absolutely bound to levy upon it so as to make the senior execution a lien prior to that of the junior execution, unless the senior execution creditor has interfered with the discharge of the officer's duty in that behalf by some positive act indicating a waiver of his prior right, or a direction or consent on his part that his execution lie dormant or be postponed to the other. Ordinary diligence, honest motives, etc., are no defense to the officer in such a case. It was also cited in *Kellogg v. Chicago etc. R'y Co.*, 26 Id. 286, to the point that where the general charge of the court, or instructions given, are clearly correct, embracing all the points necessary for the full understanding of the jury, except some particular one, the rule is, that if a party desires to have the jury instructed upon a particular point not embraced in the charge given by the court, or if an instruction or conclusion of law merely requires modification in some particular or particulars not materially affecting its general correctness, an exception thereto should be particular, so as to call the attention of the court to the precise point of objection.

ROWE v. BLANCHARD.

[18 WISCONSIN, 441.]

"USEFUL INVENTION," WITHIN MEANING OF PATENT ACT, is one that may be applied to some practical and salutary use named in the patent; but it is not necessary that it should be of such general utility as to supersede all other inventions used to accomplish the same purpose.

ASSIGNMENT OF RIGHT TO CONSTRUCT AND USE WORTHLESS PATENTED INVENTION constitutes no consideration for a promissory note.

QUESTION AS TO WHETHER INVENTION IS USEFUL MUST BE LEFT TO JURY, under proper instructions, in an action upon a note, the consideration of which is the right to make and sell a patented invention.

INSTRUCTION IMPROPERLY REFUSED. — **IN ACTION UPON NOTE GIVEN FOR PATENT RIGHT**, the defense to which is failure of consideration, it is error for the court to refuse to instruct the jury, at defendant's request, that if the article patented is "impracticable to be used for the purpose for which it was patented, then the defense of failure of consideration is established."

INSTRUCTIONS IMPROPERLY GIVEN. — **IN ACTION UPON NOTE GIVEN FOR PATENT RIGHT**, it is error to instruct the jury, at plaintiff's request, "that if the invention patented is useful in some measure and for some purpose the patent is not void." It is too broad, and calculated to mislead the jury. So where the jury are told "that if the invention can be applied to any beneficial purpose, it may be deemed a useful invention," the charge is objectionable.

EXPRESSION, "USEFUL FOR SOME BENEFICIAL PURPOSE," FOUND IN PATENT DECISIONS, IS TO BE TAKEN in a general sense as applicable to all patents, and not as implying in a particular case, where the thing invented is worthless for the purpose intended, but of possible useful application to some other, that the patent may nevertheless be valid.

COE obtained letters patent from the United States for a certain "improvement in harrows," and in 1860 assigned the right to make and sell the same in the state of Illinois to Blanchard and Arnold, the defendants in this action. Defendants executed to Coe their two notes in part payment therefor, each for \$466.66. The notes, after becoming due, were transferred to the plaintiff, who sued upon them, claiming to be the lawful owner and holder. Failure of consideration was set up in defense, the answer alleging that the "improved harrow," constructed in accordance with the patent, was, "as an agricultural implement, wholly unfit and impracticable for use, and wholly worthless; and that the said pretended improvement then was, and ever has been, of no value whatever." As to the value of the patented improvement in question, the evidence on the trial was conflicting. The instructions given and refused appear in the opinion. Verdict for the plaintiff; motion for new trial denied; judgment upon the verdict; and defendants appealed.

Palmer and Hooker, for the appellants.

Peter Yates, for the respondent.

By Court, DIXON, C. J. The meaning of the word "useful," as employed in the patent act, is thus defined by Judge Story: "By useful invention, in the statute, is meant such a one as may be applied to some beneficial use in society, in contradistinction to an invention which is injurious to the morals, the health, or the good order of society. It is not necessary to establish that the invention is of such general utility as to

supersede all other inventions now in practice to accomplish the same purpose. It is sufficient that it has no noxious or mischievous tendency; that it may be applied to practical uses; and that so far as it is applied it is salutary. If its practical utility be very limited, it will follow that it will be of little or no profit to the inventor, and if it be trifling, it will sink into utter neglect. The law, however, does not look to the degree of utility; it simply requires that it shall be capable of use, and that the use be such as sound morals and policy do not discountenance or prohibit": *Bedford v. Hunt*, 1 Robb's Pat. Cas. 148; S. C., 1 Mason, 302. This, we believe, is the language of nearly all the authorities upon the subject: *Lowell v. Lewis*, 1 Robb's Pat. Cas. 131; S. C., 1 Mason, 182; *Kneass v. Schuylkill Bank*, 1 Robb's Pat. Cas. 303; S. C., 4 Wash. C. C. 9; *Whitney v. Emmett*, 1 Robb's Pat. Cas. 567; S. C., 1 Bald. 303; *Langdon v. De Groot*, 1 Robb's Pat. Cas. 433; S. C., 1 Paine, 203; *Stanley v. Whipple*, 2 Robb's Pat. Cas. 1; S. C., 2 McLean, 35; *Dickinson v. Hall*, 14 Pick. 217; *Lester v. Palmer*, 4 Allen, 145. The "practical uses" to which the invention may be applied, or of which "it shall be capable," we understand to be the uses intended by the patentee, and named in the patent. Upon the question of its practicability in this case, there was a conflict of testimony. It was a question to be decided by the jury, under proper instructions from the court: *Park v. Little*, 1 Robb's Pat. Cas. 17; S. C., 3 Wash. C. C. 196. If it was practically useless, then there was no consideration for the notes: *Dickinson v. Hall*, 14 Pick. 217; *Lester v. Palmer*, 4 Allen, 145. The defendants' counsel asked the court to give the jury the following instruction, which was refused: "If you find from the testimony that this harrow is impracticable to be used for the purpose for which it was patented, then the defense of want of consideration is established." This was error. The instruction should have been given.

Again, the court instructed the jury, at the request of the plaintiff, as follows: "If the jury find the invention patented to be useful in some measure and for some purpose, then the patent is not void; and if not void, and they find the plaintiff to be the owner of the notes, then their verdict must be for the plaintiff." This instruction was too broad, and calculated to mislead the jury. In discussing the question of usefulness before the jury, the purpose for which the machine was invented should not be lost sight of. The jury may have supposed that, though practically useless as a harrow, yet if it

could be applied to any other purpose, the patent was good. This is clearly not the law; and though the expression "useful for some beneficial purpose" is to be found in some of the decisions, it is to be taken in a general sense, as applicable to all patents, and not as implying in a particular case, where the thing invented is worthless for the purpose intended, but of possible useful application to some other, that the patent may nevertheless be valid.

The same objection exists to that part of the charge in which the jury were told "that if the harrow could be applied to any beneficial purpose, it might be deemed a useful invention; but if it was not capable of some such use, and was wholly worthless, the transfer of a right to make, etc., would not be a valid consideration for the note."

Judgment reversed, and a new trial awarded.

NOTE GIVEN FOR VOID PATENT RIGHT is without consideration and void: *Dickinson v. Hall*, 25 Am. Dec. 390.

INVENTION MUST BE "USEFUL for some beneficial purpose" in order to be the subject of a patent: *Dickinson v. Hall*, 25 Am. Dec. 390.

CITATIONS OF PRINCIPAL CASE. — Sometimes the validity of a patent comes collaterally in question in the state courts, where an action is brought in those courts upon a note given for a patent right, and the defense is that there was no consideration for the note. This was so in the principal case; *Rice v. Garnhart*, 34 Wis. 463; *Page v. Dickerson*, 28 Id. 697. In such cases, the courts, in order to protect the rights of parties and to determine the binding obligations of contracts, are necessarily compelled to inquire whether there was a failure of consideration of the note because the patent right for which the note was given was not "useful for any beneficial purpose": See same cases. And in an action brought in a state court to recover the price agreed to be paid for a patent right, or for the right to manufacture and sell a patented article, the defendant, for the purpose of showing want or failure of consideration, may show that the patent is void, and for that purpose may prove that the invention is valueless, or that the patentee was not the inventor of the patented article; and he may establish the fact that the patentee is not the inventor by proof that the invention had been in use before the patent issued, or that the patent is an infringement of a prior patent: *Croninger v. Paige*, 48 Id. 233.

LINDSEY v. McCLELLAND.

[18 WISCONSIN, 481.]

CERTIFICATE OF DEPOSIT PAYABLE "IN CURRENT FUNDS" IS NOT NEGOTIABLE PAPER.

CERTIFICATE OF DEPOSIT PAYABLE "IN MONEY" SEEMS TO POSSESS ALL REQUISITES OF NEGOTIABLE PROMISSORY NOTE, and as between the indorser and indorsee the latter is held only to reasonable diligence in presenting it for payment.

IS REASON PARTIES TO NEGOTIABLE CERTIFICATE OF DEPOSIT DO NOT CONTEMPLATE IMMEDIATE DEMAND OF PAYMENT; therefore an indorsee, as against the indorser, is not held to the same degree of diligence in presenting it for payment as the law requires in other cases.

IF PAYEE OF NOTE, AFTER IT FALLS DUE, SURRENDERS IT TO MAKER ON RECEIVING FROM HIM CERTIFICATE OF DEPOSIT, payable in current funds for a part of the amount due, and the remainder in cash, and upon presentation of the certificate at the bank five or six days afterwards, the bank refuses payment on account of having failed in the mean time, the payee may recover the amount against the maker of the note, unless it appears that he expressly agreed to take the certificate in payment of his debt.

ACTION on a note made by defendant to plaintiff, April 16, 1861, on which there was claimed to be due a balance of \$217, etc. Answer, general denial and payment. The defendant, about the middle of June of that year, gave plaintiff for the note a certificate of deposit on the Berlin Bank. The certificate was payable "in current funds" to defendant or his order, and was indorsed by him. The evidence showed no express agreement that the certificate was taken in payment of the indebtedness on the note; and the jury inferred no such agreement from the facts. The plaintiff appeared, from the evidence, to have taken it conditionally. Between the time of receiving the certificate and the time of its presentation the bank had gone down. The jury were instructed as stated in the opinion, and also that the law relating to commercial paper on questions of diligence did not apply to an instrument of this kind. Other facts are stated in the opinion. Verdict and judgment for plaintiff, and defendant appealed.

J. C. Truesdell, for the appellant.

Hamilton and Perkins, for the respondent.

By Court, COLB, J. The circuit court was most unquestionably right in holding that the law relating to bills of exchange and commercial paper on the question of diligence did not apply to the certificate of deposit produced on the trial and read in evidence. That certificate was by its very terms made payable "in current funds," which this court held, in *Ford v. Mitchell*, 15 Wis. 304, rendered the instrument non-negotiable. It is not payable in money, or what the court is bound to consider as equivalent to money: See authorities cited in *Ford v. Mitchell, supra*; Edwards on Bills and Promissory Notes, 134 et seq. Even if the certificate had been negotiable, it may be questionable whether the indorsee was guilty of laches

in holding it five days before he presented it for payment. The prevailing opinion seems to be that such an instrument, when payable in money, possesses all the requisites of a negotiable promissory note: *Miller v. Austin*, 13 How. 218; *Bank of Orleans v. Merrill*, 2 Hill, 295; *Kilgore v. Bulkley*, 14 Conn. 362; *Laughlin v. Marshall*, 19 Ill. 390; *Bank of Peru v. Farnsworth*, 18 Id. 563, and authorities cited in those cases; and therefore it would be sufficient if the demand of payment be made within a reasonable time. This certificate of deposit bore date the 20th of June, and it was presented for payment on the 26th of the same month. Now, there is much reason for saying that in an instrument of that nature neither the parties to it nor the indorser contemplates an immediate demand for the payment, and hence the holder may not be responsible for the use of the same degree of diligence as the law requires in other cases. For there would seem to be no object in depositing money in a bank with the intention of immediately drawing it out. And therefore we think there was no want of diligence in presenting this certificate to the bank for payment. The circuit court instructed the jury that the plaintiff was entitled to recover unless they found from the evidence that he had expressly agreed to take the certificate of deposit in payment of his debt. This instruction is in accordance with well-established principles. The evidence in the case is most clear and satisfactory on the point that the certificate was not taken in payment of the pre-existing indebtedness. At all events, the jury were properly instructed upon the law applicable to that defense.

We see no error in the record which would warrant a reversal of the judgment.

The judgment of the circuit court is affirmed.

CERTIFICATE OF DEPOSIT, PAYABLE "IN CURRENCY," is negotiable paper: *Drake v. Markle*, 83 Am. Dec. 358; *Howe v. Hartness*, 78 Id. 312; note to *McMillan v. Richards*, 70 Id. 675; *Bean v. Briggs*, 63 Id. 464. Terms "currency," "funds," and "current funds" defined: *Galena Ins. Co.*, 81 Id. 284.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: Where money is borrowed by and loaned to a firm, and upon its credit, the taking of the individual note of one member of the firm is not a payment of such firm debt, unless it is affirmatively shown that such note was taken in payment of the same: *Hoeflinger v. Wells*, 47 Wis. 631. The taking of a bill of exchange, on a previous indebtedness of the drawer to the payee is *prima facie* payment of the debt. And it is absolute payment, if the payee or holder, through his own negligence, fails to take proper steps to obtain payment of the bill, or if not paid, to charge the drawer with his

bility upon it; as if the payee or holder fails to present it within the proper time, or presenting it, fails to give proper notice of its non-acceptance or non-payment, in cases where such notice is required: *Allan v. Eldred*, 50 Wis. 736. The principal case, and other Wisconsin cases concerning the negotiability of certificates of deposit, were criticised and explained in *Klauber v. Biggerstaff*, 47 Id. 555, 556, 562, 563. This case held that the word "currency," in a certificate of deposit, means "money," including bank notes, and that a certificate of deposit promising payment to order of a certain number of dollars "in currency" is negotiable. But in upholding the negotiable quality of the certificate of deposit in that case, it was not found necessary to expressly overrule any of the cases above referred to, or any material part of the language used in the opinions given upon them.

WATRY v. FERBER.

[18 WISCONSIN, 500.]

IN ACTIONS FOR SEDUCTION, AND ON TRIALS FOR RAPE, DEFENDANT IS ALWAYS PERMITTED TO PROVE that the general character of the servant or prosecutrix for chastity is bad; and this must be done by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity.

SAME — INNOVATIONS UPON GENERAL RULE. — Character of the prosecutrix for chastity may be impeached, not only by general evidence of her reputation in this respect, but she may be asked whether she has not had previous criminal connection with the accused; and if she is examined as a witness for the prosecution, she may be inquired of, on cross-examination, whether she had not, at certain specified times and places, had sexual intercourse with other persons besides the accused. These questions go to repelling the allegation of force.

IN ACTION FOR SEDUCTION, THOUGH FEMALE CANNOT BE INTERROGATED HERSELF as to acts of unchastity with others, yet third persons may be called to testify to their own criminal intercourse with her, and the time and place.

EVIDENCE AS TO PRIOR ACTS OF UNCHASTITY WITH OTHERS ADMISSIBLE IN CIVIL ACTION OF TRESPASS, WHEN. — Where the plaintiff in an action for an assault has alleged, as a matter of aggravation, that the defendant had connection with her against her will, the defendant has a right to show that the plaintiff has been previously criminal with other persons, as a circumstance tending to repel the allegation of force.

ACTION by Catherine Ferber against Jean P. Watry. Verdict and judgment for plaintiff. The facts are stated in the opinion.

Hugh Cuning, for the plaintiff in error.

George W. Foster, for the defendant in error.

By Court, COLE, J. If we correctly understand the complaint in this case, and the cause of action intended to be stated therein, it is for an assault upon the plaintiff below, and

sets forth, as matters of aggravation, that the defendant had carnal intercourse with her against her will, and got her with child. On the trial the plaintiff was sworn in her own behalf, and testified fully as to the times and circumstances under which the defendant had intercourse with her. She represented that she resisted the efforts of the defendant to have such connection with her, but that he accomplished his purpose by the use of force and against her will. She was asked, on cross-examination, whether she had not had carnal intercourse with others besides the defendant about the time the alleged injurious acts were committed upon her, and particularly with one Weyker. She answered these questions in the negative. On the defense testimony was introduced tending to show that the general character of the plaintiff for truth and chastity was bad. The defendant then offered evidence to show that the plaintiff had carnal intercourse with other persons than the defendant in the fall of 1857, and in the month of October of that year, which was the time that it was alleged she was first ravished; but this evidence was objected to, and ruled out by the court. And the real difficulty we have found in the case was in determining whether this evidence was admissible in this action, as a circumstance to repel the allegation of force, or for any other purpose.

In actions for seduction, and on trials for rape, the defendant is always permitted to prove that the general character of the servant or prosecutrix for chastity is bad; and the common statement of the rule is, that this must be done by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity. The reason given for the rule is, that while it is presumed that a party is always prepared to defend his general character when unjustly assailed, he cannot be presumed to be ready to defend and explain particular acts, and therefore is liable to be taken by surprise if his character is impeached upon that ground. But there have been innovations made upon this rule; and in all the later cases which I have examined, it is said that the character of the prosecutrix for chastity may be impeached, not only by general evidence of her reputation in this respect, but likewise that she may be interrogated whether she has not had previous criminal connection with the accused. For if it should appear that her reputation for chastity was bad, or that she had had sexual intercourse with the defendant, the probability that force was used would be very slight indeed.

And in the following cases it is said that if the female upon whom the offense is charged to have been committed is examined as a witness for the prosecution, she may be inquired of on cross-examination whether she had not, at certain specified times and places, had sexual intercourse with other persons besides the accused: *People v. Abbot*, 19 Wend. 192; *State v. Johnson*, 28 Vt. 512; *Rex v. Barker*, 3 Car. & P. 589; S. C., 14 Eng. Com. L. 467; *Andrews v. Askey*, 8 Car. & P. 7; S. C., 84 Eng. Com. L. 270; *Rex v. Martin*, 6 Car. & P. 562; S. C., 25 Eng. Com. L. 544. In *People v. Benson*, 6 Cal. 221 [65 Am. Dec. 506], evidence that the prosecutrix had committed acts of lewdness with other men was held to be admissible, and the court thought that proof of particular acts should be admitted in preference to general reputation. The case of the *People v. Abbot*, 19 Wend. 192, is cited in support of this ruling, and the reasoning of Mr. Justice Cowen undoubtedly goes nearly, if not quite, to that extent. But this reasoning has been severely criticised by other judges as being unsound in theory and unsupported by authority: *People v. Jackson*, 8 Park. Cr. 391; *Pleasant v. State*, 15 Ark. 624; and Judge Bennett in his dissenting opinion in *State v. Johnson*, 28 Vt. 512; see also *State v. Jefferson*, 6 Ired. 305; *McCombs v. State*, 8 Ohio St. 643. But whatever may be the true rule in regard to the admission of such testimony in criminal prosecutions, it appears to us that in a civil action of trespass, where the plaintiff has alleged, as a matter of aggravation, that the defendant had connection with her against her will, the defendant should be permitted to show that the plaintiff has been previously criminal with other persons, as a circumstance tending to disprove the probability of the use of force.

Professor Greenleaf says that in an action for seduction, though the female cannot be interrogated herself as to acts of unchastity with others, yet third persons may be called to testify to their own criminal intercourse with her, and the time and place: 2 Greenl. Ev., sec. 577. Justice Bennett, while he vigorously dissents, in *People v. Johnson*, 28 Vt. 512, from the decision of the court, that upon the trial upon an indictment for rape, the prosecutrix may be inquired of, on cross-examination, whether she has not been criminally intimate with other men, yet says that in cases of seduction the defendant may prove on the trial that the daughter or servant has been previously criminal with other persons, as affecting the question of damages: Page 521. In *Verry v. Watkins*, 7 Car. & P.

308, S. C., 32 Eng. Com. L. 520, which was an action for the seduction of plaintiff's daughter, witnesses were sworn to prove particular acts of lewdness between them and the daughter. See also *Bamfield v. Massey*, 1 Camp. 460, to the same effect. In *Carpenter v. Wall*, 11 Ad. & E. 803, S. C., 39 Eng. Com. L. 234, which was an action of the same character as the last two, a witness for the defense was asked whether the plaintiff's daughter had not told witness that A B was the father of the child, and had seduced and left her. The question being objected to, because the daughter had not been cross-examined as to whether she ever made such statements, the evidence was ruled out. The counsel, in arguing the rule for a new trial, contended that the expressions of the witness were tendered to show the looseness of her conduct,—a description of evidence admissible in actions for seduction and *crim. con.* Lord Chief Justice Denman, before whom the cause was tried, stated that if the language had been offered in evidence as showing that the witness went about in a light manner saying things of that description he should not have rejected it. But as the object of the proof was to impeach the credit of the witness, the declarations could not be admitted, unless the witness had first been asked if she ever made them, and had an opportunity of explanation. The other judges concurred in this view of the law. Mr. Justice Cowen, in his very able and full discussion of the authorities upon the other point, in *People v. Abbot*, 19 Wend. 192, cites some cases having a strong bearing upon the question we are now considering; but we do not deem it necessary to particularly refer to them. In the kindred action brought by the husband for seducing his wife, in which her character is in issue, it is permissible for the defendant to show, in what is called mitigation of damages, the previous bad character and conduct of the wife, whether in general or in particular instances of unchastity: 2 Greenl. Ev., sec. 556.

Now, within the reasoning and principle of the cases above cited, it appears to us that the evidence offered on the trial on the part of the defendant was admissible. Would not proof that the plaintiff was criminally intimate with other men, about the period referred to in the complaint, when the alleged ravishment took place, tend to disprove the allegation of force? It might be a slight circumstance bearing upon that point; nevertheless it has a tendency to overcome the probability that force was used. For there is no mind which does not re-

quire a higher degree of proof to convince it that force has been used to compel a woman who has once fallen from virtue to submit to the embraces of the opposite sex than in case of a virtuous female. The fact that the plaintiff had yielded her person to others would raise an inference that she might have yielded to the entreaties of the defendant without much force. At all events, we think it a circumstance which might be submitted to the jury upon that question.

We therefore think there must be a new trial on account of the exclusion of the testimony offered to show that plaintiff had criminal intercourse with other persons in the fall of 1857.

The judgment of the circuit court is reversed, and a new trial ordered.

ACTION FOR SEDUCTION, ADMISSIBILITY OF EVIDENCE AS TO PRIOR ACTS OF UNCHASTITY: See extended note to *Weaver v. Bachert*, 44 Am. Dec. 171, 176; note to *Andre v. State*, 68 Id. 714.

RAPE — EVIDENCE AS TO GENERAL CHARACTER AND PARTICULAR ACTS OF UNCHASTITY, ADMISSIBILITY OF: See *People v. Benson*, 65 Am. Dec. 506; *McDermott v. State*, 82 Id. 444, and note 447; *State v. Forshner*, 80 Id. 132, and note 135; and extended note to *Smith v. State*, 80 Id. 361-375, where various propositions in the *syllabus, supra*, will be found discussed on pp. 368, 369, 371.

EVIDENCE OF CHARACTER IN CIVIL ACTIONS: See extended note to *O'Bryan v. O'Bryan*, 53 Am. Dec. 133; *Fraser v. Pennsylvania R. R. Co.*, 80 Id. 467, and note 470.

CORWITH v. STATE BANK OF ILLINOIS. SAME v. SAME.

[18 WISCONSIN, 560.]

WRITTEN NOTICE MUST BE GIVEN TO CUT OFF RIGHT OF APPEAL. The right of a party to appeal from an order of court is not cut off, under the Wisconsin statute, until the expiration of thirty days after the service upon him of a written notice of the making of such order, although he may have had actual knowledge of the order independently of such a notice, and may even himself have drawn it up by his attorney.

REVERSAL OF JUDGMENT FOR ERROR WILL NOT AVOID SALE UNDER EXECUTION, if such sale was made to a stranger; but where the sale was made to the plaintiff in the execution it is otherwise.

NEGLECT OF CLERK TO AFFIX SEAL OF COURT TO WRIT OF EXECUTION DOES NOT RENDER IT VOID, nor the sale made under it.

WRIT OF EXECUTION MAY BE AMENDED WHERE IT HAS NO SEAL, by the court's ordering the seal to be affixed.

PURCHASER'S TITLE UNDER EXECUTION MERELY ERRONEOUS WILL BE PROTECTED.

WHETHER SHERIFF'S DEED FOR PROPERTY SOLD UNDER DEFECTIVE WRIT OF EXECUTION HAS BEEN EXECUTED OR NOT makes no difference. The purchaser's title will be protected as well before as after the giving of the sheriff's deed.

THE facts are stated in the opinion.

Emmons and Van Dyke, for the defendant.

J. H. Knowlton and J. A. Sleeper, contra.

By Court, COLE, J. Before these causes were reached for argument, a motion was made to dismiss the appeal in the case where the bank is appellant. That motion was taken up and considered with the case upon the merits, and our conclusions upon it will now be stated.

These are cross-appeals from different parts of the same order made by the circuit court of La Fayette County, on a motion made by the State Bank of Illinois to vacate and set aside certain execution sales. The motion was granted as to some of the sales and denied as to others, and each party has appealed from so much of the order as affects injuriously his interests. It appears from the motion papers that the attorneys for the bank drew up and procured to be entered the entire order; and the motion to dismiss is based upon the fact that no appeal was made or taken by the bank from any part of the order within thirty days from the time it was entered. It is admitted, however, that there has been no written notice given by the adverse party of the entry of this order; but it is contended that this is not necessary where a party appeals from an order or judgment that he himself has drawn up and entered. The question then is, Must written notice be given under such circumstances, in order to cut off the right of appeal? We are of the opinion that it must be.

Section 9, chapter 264, Laws of 1860, provides that appeals may be taken to the supreme court from judgments in civil actions within two years from the entry thereof, and from orders made by the circuit court within thirty days after written notice of the making of the same. Now, we think it very clear, from the language here employed, that it was not the intention of the legislature to limit the right of appeal from an order to the period of thirty days from the time the party whose rights are adversely affected by it has notice or knowledge of the entry of the order. For if this were the real object and intent of the statute, then it might with propriety be held that verbal notice, or the fact that the party was in court when the order was announced, would be sufficient. But the statute requires that, in order to limit the time for appealing, written notice must be given of the entry of the order. This is a limitation upon the right of appeal, and the prevailing

party can set the statute running against his adversary by giving the written notice prescribed therein. He has the whole matter under his control, and can set the statute running when he pleases. The corresponding provision of the New York statute is substantially the same as section 9. In *Rankin v. Pine*, 4 Abb. Pr. 309, this precise question was presented to the supreme court of the second district, at general term. It was there held that the service of written notice of a judgment or order, in order to limit the right of appeal by the expiration of thirty days (as contemplated by section 832 of the code of that state), is necessary, even when the appeal is taken from a judgment or order entered by the appellant himself. And when we consider the whole statute, and have regard to the principle that the right of appeal is favored by the courts, we are satisfied that this construction is the one to be adopted. The cases of *Fry v. Bennett*, 7 Abb. Pr. 352, *Leavy v. Roberts*, 8 Id. 810, *Staring v. Jones*, 13 How. Pr. 423, and *Sherman v. Wells*, 14 Id. 522, will be found to have a strong bearing upon the point we have been considering. We have been referred, in support of the motion to dismiss, to the case of *Cameron v. Sullivan*, 15 Wis. 510. It would be unprofitable to dwell upon the question decided there, and we will merely add that we do not think there is anything in the decision of that cause in conflict with the views already expressed. The motion to dismiss the appeal is therefore denied.

And this brings us to a consideration of the appeal upon the merits.

In *Corwith v. State Bank of Illinois*, 15 Wis. 289, it was stated to be a well-settled rule of law, that where a judgment is reversed for error, a sale under the execution will not be avoided because of such reversal. It was held, however, in that case, that the reason and principle of this rule failed where the plaintiff in the execution was a purchaser at the sale. As he had parted with no money upon the strength and credit of the sale, but had taken the property in satisfaction of his judgment, no inconvenience or hardship would result if restitution was ordered on reversal of the judgment. Not so, however, with strangers, who had parted with their money at the sale. Their titles were to be protected, and they could not be affected by any subsequent acts over which they had no control. That this is the well-established doctrine of the authorities there can be no doubt: *Woodcock v. Bennet*, 1 Cow.

711 [13 Am. Dec. 568]; *Jesup v. City Bank of Racine*, 15 Wis. 604. This rule of law, then, disposes of these appeals, unless the position can be maintained that the sales under the executions were absolutely void because the seal of the court was not attached to them by the clerk when the writs were issued. And we are clearly of the opinion that the sales cannot be avoided for that reason. The neglect of the clerk to affix the seal of the court to the writs did not render them void. It was a defect which could be cured by amendment, as the large number of authorities cited upon that point by the counsel for the purchasers abundantly established. The record shows that the seals were affixed to the executions by an order of court before this motion was made to set aside the sales. We cannot doubt the power of the court to make this amendment. The power given courts in chapter 100 of the Revised Statutes of 1849, to rectify and amend errors in their proceedings, writs, and process is exceedingly broad and liberal. It was properly exercised in this case to cure the mistake of the clerk in neglecting to affix seals to the executions in the first instance.

The circuit court vacated and set aside the sales in cases where no deeds had been executed and delivered by the sheriff to the purchasers; but where such deeds had been given, refused to set them aside. We see no reason for setting aside the sales in the one case which does not apply with equal force to the other. The authorities make no distinction between a case where the sheriff's deed has been given and one where it has not; and we think there is no valid ground for making any such distinction. If the title of the purchaser is to be protected when acquired under an execution merely erroneous (which must be a conceded point, under the authorities), why should it not be so protected as well before as after the giving of the sheriff's deed? We are unable to see any substantial reason for making a distinction in the cases, and do not think any exists in law.

So much of the order as vacated the sales where no deeds had issued is reversed, and the rest of the order is affirmed.

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APPEALS MUST BE TAKEN IN MANNER PRESCRIBED BY STATUTE in cases where appeals are given by statute: *Haight v. Gay*, 68 Am. Dec. 323.

JUDGMENT, REVERSAL OF, EFFECT OF AS TO PURCHASER'S TITLE UNDER EXECUTION SALE: *Ponder v. Moseley*, 48 Am. Dec. 194; *Clark's Heirs v. Farrow*, 52 Id. 552; *O'Donnell v. Mullin*, 67 Id. 458. Stranger takes a good title: *Stroud v. Casey*, 78 Id. 556; but not so with plaintiff, when: Id.

OMISSION OF SEAL FROM WRIT OF EXECUTION IS DEFECT WHICH COURT MAY ORDER AMENDED: *Purcell v. McFarland*, 35 Am. Dec. 734, and note 735; note to *Bybee v. Ashby*, 43 Id. 52. But that the authorities are not all one way, see *Woolford v. Dugan*, 35 Id. 52, and note 53.

PURCHASER'S TITLE UNDER EXECUTION MERELY ERRONEOUS WILL BE PROTECTED: *Casey v. Gregory*, 56 Am. Dec. 581, and note 584; *Shelton v. Hamilton*, 57 Id. 149; *Newton v. State Bank*, 58 Id. 363; *Sowles v. Harvey*, 83 Id. 315, and note 316; *Elliott's Lessee v. Knott*, 74 Id. 519, and note 521, containing collected cases, and giving limitations of the rule; *Draper v. Bryson*, 57 Id. 257; *Minor v. Natchez*, 43 Id. 488; *Lowber and Wilmer's Appeal*, 42 Id. 302.

SHERIFF'S DEED HAS EFFECT BY RELATION to the time of the levy of the execution. It invests the purchaser with the right of entry from the time of the sale: *Chalfin v. Malone*, 50 Am. Dec. 525; *Ferguson v. Miles*, 44 Id. 702, and notes to these cases.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: The omission of the seal of the court from which execution issues would seem to be quite as serious a defect as the failure to state the time and place of docketing a judgment. And as the court held in the principal case that a sale made under an execution which was not sealed was not void, but that the purchaser acquired a valid title at the execution sale; so in *Sabin v. Austin*, 19 Wis. 423, it was held that where an execution fails to specify where and when the judgment was docketed on which it issued, the defect was such as might be amended by the court after a levy and sale; that a sale made in pursuance of the writ was not void; and that the certificate of sale would not be annulled by a court of equity on account of such defect. Applications to set aside sales on execution for irregularities are largely addressed to the discretion of the court; but that discretion should be so exercised as to secure the ends of justice. The fact that a sheriff's deed has been executed to the purchaser is not a controlling circumstance in the way of setting aside a sale; for a purchaser at a sheriff's sale, although a stranger to the judgment or decree, by his purchase submits himself to the jurisdiction of the court in respect to the sale and purchase: *Grede v. Dannenfelser*, 42 Wis. 85. The right to appeal from an order is not barred until the expiration of thirty days after service of a written notice of the making or entry of the order upon the party appealing: *Couldren v. Caughey*, 29 Id. 320; *Orton v. Noonan*, 32 Id. 223; *Parker v. McAvoy*, 36 Id. 324; *Rosenkrans v. Kline*, 42 Id. 561. These cases show that the statutory limitation of time does not begin to run until the written notice is given; and the facts that the order was served upon appellant's attorney, and that he filed exceptions thereto, do not take the case out of the rule: *Rosenkrans v. Kline*, *supra*. But the doctrine of these cases has no application to an appeal from an interlocutory order where the period for appealing from the final judgment has expired, and should not be so understood; for an appeal from an interlocutory order will not lie after the time for appealing from the judgment has expired: *Parker v. McAvoy*, 36 Id. 324.

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ALTERATION OF INSTRUMENTS.

1. ALTERATION OF WRITTEN CONTRACT IN MATERIAL PART, WITHOUT CONSENT OF PARTIES, DISCHARGES THEM from liability. This rule applies to bills and notes as well as to all other species of contract. *Brownell v. Winnie*, 314.
2. SEVERAL PROMISSORY NOTE IS NOT MATERIALLY ALTERED by the addition of the name of another person as maker, without the knowledge or consent of the original signer. *Id.*
3. JOINT AND SEVERAL PROMISSORY NOTE, SIGNED BY TWO PERSONS AS MAKERS, IS MATERIALLY ALTERED by the addition of the name of another person, without the knowledge and assent of one of the makers. *Id.*
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ATTACHMENT.

1. **GENERAL PROPERTY IN THING ATTACHED, PENDING SUIT IN WHICH ATTACHMENT ISSUED**, remains in the owner, with no abatement of right except what is operated by the attachment. *Mussey v. Perkins*, 688.
2. **OWNER OF WOOD ATTACHED MAY MAINTAIN TROVER FOR ITS CONVERSION** by a third person pending the attachment, the property having been left in the actual possession of the owner. *Id.*
3. **PERMISSION TO SUBSEQUENT ATTACHING CREDITORS TO APPEAR AND DEFEND PRIOR ATTACHMENT** is within the sound discretion of the court under the Missouri statute; and the refusal of permission to such creditors to plead in abatement is not error where there is nothing to show that the court exercised its discretion unsoundly. *Jump v. Batton's Creditors*, 146.
4. **SUBSEQUENT ATTACHING CREDITOR, IN DEFENDING AGAINST PRIOR ATTACHMENT, MUST PLEAD** within the time allowed to the attachment defendant. *Id.*
5. **CITIZEN OF ONE STATE, IF DULY SERVED WITH TRUSTEE PROCESS IN ANOTHER, MUST APPEAR AND ANSWER**, or judgment will be rendered against him upon his default; but he will not be charged as trustee, if it appears on disclosure that he had no property of the principal debtor in the latter state, and is not liable to him upon any debt or contract to be paid or performed therein. *Lawrence v. Smith*, 183.

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1. **WHETHER ATTORNEY AT LAW HAS POWER AFTER OBTAINING JUDGMENT TO ASSIGN IT**, *quære*. *Fassitt v. Middleton*, 535.
2. **ATTORNEY AT LAW HAS NO POWER AFTER JUDGMENT TO MAKE SUCH ASSIGNMENT OF IT** to one who pays it because he must do so as will continue the judgment to the prejudice of his client's rights in other respects. *Id.*
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4. PROTECTION FROM DISCLOSURE OF COMMUNICATIONS FROM CLIENTS TO ATTORNEYS SHOULD ONLY BE HELD TO EXTEND to such communications as have relation to some suit or other judicial proceeding, either existing or contemplated. *Per Selden, J. Whiting v. Barney, 385.*
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BANKS AND BANKING.

1. CASHIER OF BANK HAS POWER TO TRANSMIT NOTE FOR DISCOUNT AND COLLECTION to another bank, and to transfer the title thereto to the latter. *Potter v. Merchants' Bank, 273.*
2. MERE CLERK, ACTING AS CASHIER IN LATTER'S ABSENCE, HAS NO AUTHORITY to transfer any of the notes or securities of the bank, unless such authority has been conferred on him by the directors. The cashier cannot clothe him with any more of his power than is necessary to enable such clerk to carry on the usual and ordinary business of the bank. *Id.*
3. BANK CLERK, INTRUSTED BY CASHIER WITH ORDINARY BUSINESS OF BANK, HAS POWER to transmit notes owned by the bank, or held by it for collection, and payable in other places, or at other banks, to its agents for that purpose, and may indorse such paper for the bank, when necessary, to vest in the collecting agents such title as is required. *Id.*
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BONA FIDE PURCHASERS.

1. TO SUSTAIN CLAIM OF BONA FIDE PURCHASER, ONE MUST SHOW that he had no notice of previous conveyance, that his purchase was upon valuable consideration, and that the consideration was paid before the purchaser obtained notice. *Blanchard v. Tyler, 57.*
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2. **FACT THAT DEFENDANT HAD, FOR MORE THAN TWENTY YEARS, INCLOSED LAND IN DISPUTE**, with his other lands, by a fence which extended and embraced other land of the plaintiff beyond a line not indicated so as to be discernible, up to which the defendant claimed by adverse possession, would not give the defendant constructive possession to such line. *Id.*
3. **PRESUMPTION IS THAT PROPRIETOR OF ADJOINING LOT OWNS TO CENTER OF STREET**, and that the purchaser takes to the center by virtue of a conveyance of the lot. People act upon this presumption in buying and selling, but it may be rebutted. *Weisbrod v. Chicago etc. R'y Co.*, 743.
4. **SAME — PRESUMPTION SHOULD BE CONCLUSIVE WHEN.** — Where adjoining proprietors lay out their lands into city lots, acknowledging and recording their plats with nothing upon them to indicate the original boundaries, thus in fact extinguishing such boundaries, and intending that the lots shall be bought and sold by the plats, and the plats alone, or where the plats indicate the center of a street as the line of original division, the presumption should become conclusive in favor of grantees and purchasers from either proprietor, without actual notice of the rights of the other. *Id.*
5. **PURCHASER OF TOWN LOTS IS AFFECTED WITH NOTICE FROM TOWN PLATS THEMSELVES**, where the original boundary lines of lots fronting upon a street appear upon the plats and show that one adjoining proprietor owns more of the soil of the street than the other. *Id.*
6. **PURCHASER OF LAND ON EITHER SIDE OF COMMON COUNTRY HIGHWAY IS PROBABLY BOUND** to ascertain the actual division line between it and the land on the opposite side, regardless of the easement by highway. *Id.*
7. **TOWN PLATS ARE PUBLIC RECORDED REPRESENTATION THAT SOIL OF STREETS**, subject to the public easement, belongs to the proprietors of the adjacent lots, and that the center of the street is the real line of division between them; and if by mistake or other cause the streets are in fact wider than the proprietors intended, the application of the rule must still be the same. *Id.*
8. **ADJOINING PROPRIETORS, BY MAKING AND RECORDING TOWN PLATS, MAKE CENTER LINE OF STREET** the line of division of lots as to purchasers without actual notice; and each proprietor authorizes the other, as to lots owned by that other, to sell as the owner of one half of the soil of the streets fronting upon such lots. *Id.*

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COMMON CARRIERS.

1. **COMMON CARRIER IS RESPONSIBLE FOR LOSS OF OR INJURY TO GOODS** intrusted to him for transportation, unless the loss or injury happen in consequence of the act of God or the public enemy. *Read v. Spaulding*, 426.
2. **COMMON CARRIER IS RESPONSIBLE FOR INJURY TO GOODS BY ACT OF GOD**, if he departs from his line of duty, and while thus in fault, and in consequence of the fault, the goods are injured by an act of God, which would not otherwise have caused the injury. *Id.*
3. **COMMON CARRIER IS RESPONSIBLE FOR INJURY TO GOODS BY ACT OF GOD**, where the goods were exposed to the injury by the carrier's unreasonable delay in forwarding them. *Id.*
4. **ACT OF GOD, EXEMPTING COMMON CARRIER FROM LIABILITY FOR INJURY TO OR LOSS OF GOODS**, is an act occasioned exclusively by natural causes, such as could not be prevented by human care, skill, and foresight. *Per Wright, J. Michaels v. New York Central R. R. Co.*, 415.
5. **ACT OF GOD, TO EXCUSE COMMON CARRIER, MUST BE SOLE AND IMMEDIATE CAUSE OF INJURY.** If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, an act of God. *Per Wright, J. Id.*
6. **COMMON CARRIER IS RESPONSIBLE FOR ALL INJURIES TO GOODS** intrusted to him for transportation while under his care and control, except injuries caused by act of God or public enemies. *Id.*
7. **COMMON CARRIER IS RESPONSIBLE FOR INJURY TO GOODS BY ACT OF GOD**, if he departs from his line of duty, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God, which would not otherwise have produced the injury. *Id.*
8. **COMMON CARRIER IS UNDER DUTY TO FORWARD IMMEDIATELY GOODS RECEIVED BY IT** from a connecting line to be transported to the owners, and cannot justify a detention on the ground that by its regulations goods received from a connecting line are not to be forwarded until the receipt of a bill of back charges, and that no such bill accompanied the goods. *Id.*
9. **COMMON CARRIER IS RESPONSIBLE FOR INJURY TO GOODS BY ACT OF GOD**, where the goods were exposed to injury by the carrier's inexcusable detention. *Id.*
10. **COMMON CARRIER'S LIABILITY DOES NOT REST ON CONTRACT, BUT IS IMPOSED BY LAW.** — Irrespective of any question of negligence or fault on his part, he is liable where the loss does not occur by the act of God or the public enemies. *Merritt v. Earle*, 292.
11. **COMMON CARRIER IS INSURER AGAINST ALL LOSSES** except those occurring by the act of God or the public enemies. *Id.*
12. **BY "ACT OF GOD" IS MEANT WITHOUT AID OR INTERFERENCE OF MAN.** — The expression excludes all human agency, and denotes accidents arising from winds, storms, lightning, tempest, etc. *Id.*
13. **EXPRESSIONS "ACT OF GOD" AND "INEVITABLE ACCIDENT" ARE NOT SYNONYMOUS.** — That may be "an inevitable accident" which no foresight or precaution of the carrier can prevent. *Id.*
14. **ACT OF GOD, TO EXCUSE CARRIER, MUST BE SOLE AND IMMEDIATE CAUSE OF LOSS.** It is not enough that it may be the remote cause of the loss. *Id.*
15. **IMMEDIATE AND REMOTE CAUSES ILLUSTRATED BY FACTS.** — Where horses have been lost by the sinking of a river steamboat carrying them,

and it appears that the immediate cause of the accident and loss was the contact of the steamboat with the mast of a sloop which had been sunk, in a squall, two days before, which mast was out of water fifteen feet or more at low water, and was visible the day before and the same day of the accident, the loss cannot be attributed to "inevitable accident" or "act of God" as those terms are used in the law, but might have been avoided. The squall which sunk the sloop was but the remote or secondary cause of the accident, and could afford no shield to the carrier. *Merritt v. Earle*, 292.

16. WHETHER CARRIER'S CONTRACT, WITH RESPECT TO STATUTE RELATIVE TO OBSERVANCE OF SUNDAY, IS GOOD OR BAD MAKES NO DIFFERENCE as to his liability for property placed in his custody for transportation, and which, through his negligence or violation of duty, has been lost. *Id.*
17. LIABILITY OF RAILROAD COMPANY AS COMMON CARRIER, FOR GOODS TRANSPORTED OVER ITS ROAD, CONTINUES not only until the goods are deposited in the depot or warehouse of the company at the place of destination, but until a reasonable opportunity has been afforded the owner or consignee to take them away. *Wood v. Crocker*, 773.
18. EXTENT OF "REASONABLE OPPORTUNITY" AFFORDED CONSIGNEE OF GOODS TO TAKE THEM AWAY after carrier's transit has ended is not to be measured by any peculiar circumstances in his own condition and situation rendering it necessary, for his own convenience and accommodation, that he should have a longer time or better opportunity than if he resided in the vicinity of the depot and was prepared with the means and facilities for taking the goods away. *Id.*
19. IF CONSIGNEE, AT EARLIEST PRACTICABLE MOMENT, DOES NOT TAKE HIS PROPERTY from possession of common carrier after the transit has ended, he may thereby be deemed to have consented that it should remain in possession of the carrier under the more limited liability of a warehouseman. *Id.*
20. FACTS OF THIS CASE SHOW THAT CARRIER, AFTER TRANSIT HAD ENDED, STILL STOOD IN THAT RELATION as to the consignee, and not merely in the relation of a depository or bailee for hire. *Id.*
21. *MOSES v. BOSTON AND MAINE RAILROAD*, 32 N. H. 523, S. C., 64 AM. DEC. 381, followed and approved. *Id.*
22. RULES OF STRICT RESPONSIBILITY WHICH COMMON LAW ATTACHES TO CARRIERS should not be relaxed. *Id.*
23. DEFECT IN VESSEL OR WANT OF SKILL IN CARRIER OR HIS SERVANTS will not *per se* entitle the plaintiff to recover in an action against a common carrier for loss, but it must also appear that such defect or want of skill contributed or may have contributed in some manner to the loss. *Hill v. Sturgeon*, 149.
24. IT IS SUFFICIENT FOR CARRIER TO SHOW IN DEFENSE OF ACTION against him for loss that the loss was caused by the perils of navigation within the exceptions of the bill of lading, and he is not bound to show affirmatively the particular and identical cause of the loss. *Id.*

See RAILROADS.

CONSTITUTIONAL LAW.

1. ACT OF LEGISLATURE AFFECTING CORPORATE CHARTER, GENERAL ACT REPEALING PROVISIONS THEREIN. — Where the charter of a railroad com-

pany, which the legislature reserved the right to alter or repeal, provides that they shall be taxed at the rate of one half of one per cent per annum on the amount of money expended by them, and that no other tax shall be levied upon them, and a subsequent legislature by a general tax law subjected to taxation the real estate of all private corporations "except those which by virtue of any irrepealable contract in their charter or other contract with the state," are expressly exempt from taxation, and where said act repealed all acts, whether special or local, inconsistent with its provisions, this last general law repeals the provision in the railroad charter, and subjects the property of the latter to the system of taxation therein provided for. *State v. Mayor etc. of Jersey City*, 240.

2. **ACT OF LEGISLATURE NOT CONTRACT.** — Act of legislature granting charter to railroad company, and providing therein that the company shall be taxed only in a certain sum and manner, and reserving a right to alter or repeal this charter, does not amount to a contract with the company. It lacks the essential elements of a contract, as there is no obligation on the state to continue the tax in the form prescribed. The distinguishing difference between an ordinary legislative act and an act amounting to a contract is the implied agreement arising from some provision in the act not to alter or recall the privilege granted. *Id.*
3. **ACT OF LEGISLATURE IS CONTRACT.** — Act of legislature granting corporate privileges to a body of men and exempting them from taxation becomes, when accepted, a contract, protected from being impaired, by the constitution of the United States. But if the act reserves the right to repeal, the company take the charter subject to such alteration as the legislature deem expedient. *State v. Miller*, 188.
4. **NO IRREPEALABLE CONTRACT CAN RESULT FROM PROVISIONS IN CHARTER** which are made in terms, subject to be altered, amended, or repealed at the pleasure of the power granting them. *Id.*
5. **WHERE CHARTER PROVIDES THAT RIGHT IS RESERVED TO ALTER OR AMEND IT** whenever the public good may require, the legislature is the judge when that time comes, as that body is the proper tribunal to determine what the public good requires in all matters of legislation. *Id.*
6. **MERE GENERAL WORDS OF REPEAL IN ACT** will not affect the provisions of charters given to private or municipal corporations; but a provision in an inconsistent act, that "all other acts and parts of acts, whether special, local, or otherwise, inconsistent with the provisions of this act, are hereby repealed," will have that effect. *Id.*
7. **GENERAL ACT REPEALING PROVISIONS IN CORPORATE CHARTER RELATING TO TAXATION.** — Where, by the terms of their charter, which the legislature reserve the right to alter or repeal, a railroad company are to be taxed one and a half per cent on the cost of the road as soon as the net proceeds shall equal seven per cent, and no other tax is to be levied upon them, and a subsequent legislature by a general tax law subjected to taxation the real estate of all private corporations "except those which by virtue of any irrepealable contract in their charters or other contracts with the state," are expressly exempt from taxation, and where said act repealed all acts, whether special or local, inconsistent with its provisions, this last general law repeals the provision in the railroad charter and subjects the property of the latter to the system of taxation therein provided for. *Id.*
8. **STATUS OF CONFEDERATE STATES, SO CALLED, AS GOVERNMENT.** discussed but not decided. *Fifield v. Pennsylvania Ins. Co.*, 523.

9. **CONSTITUTIONAL LAW—STATE LAW REGULATING COMMERCE BETWEEN DIFFERENT STATES.** — Act of the legislature of the state of New Jersey relating to corporations doing business in that state, not being corporations of that state, which provides that "every such company so doing business shall pay a transit duty of three cents on every passenger, and two cents on every ton of goods, wares, and merchandise, or other articles carried or transported by or for such company on any railroad or canal in this state for any distance exceeding ten miles, except passengers and freight transported exclusively within this state," is unconstitutional, because in conflict with that provision of the United States constitution giving Congress exclusive power to regulate commerce among the several states. *Erie R'y Co. v. State*, 228.
10. **REGULATING INTERSTATE COMMERCE.** — Imposing tax upon that portion of corporation's business relating exclusively to the transportation of goods in proportion to its volume, from one state to another, amounts to a tax upon the goods themselves. The right to place this duty on this business of the corporation is equivalent, considered as a prerogative of state government, to the right to tax the goods themselves. *Id.*
11. **REGULATION OF COMMERCE BETWEEN SEVERAL STATES.** — Whenever the taxation of a commodity would amount to a regulation of commerce, so will the taxation of an inseparable incident or a necessary concomitant of such commodity. With regard to commerce between the several states, the transportation is as much a part of such commerce as the goods themselves. *Id.*
12. **STATE CANNOT TAX FOREIGN CORPORATION UPON DIFFERENT PRINCIPLE OR IN DIFFERENT MANNER** from what she can tax one of her own domestic corporations. *Id.*
13. **ACT OF TAXING PROPERTY IS ACKNOWLEDGMENT OF LEGAL STATUS OF PERSON OR COMPANY** upon whom the tax is levied. A state under a tax law cannot require a foreign corporation to pay any sum it may please, and then defend the act upon the plea that the company taxed has no rights but such as of grace may be conferred upon it. *Id.*

CONTINUANCE.

See PLEADING AND PRACTICE, 1.

CONTRACTS.

1. **WHERE PARTIES REDUCE THEIR CONTRACT TO WRITING**, such writing is presumed to contain the entire contract, as a general rule, and it cannot be shown by parol that other things were agreed on at the same time. *Hahn v. Doolittle*, 757.
2. **SAME.** — THIS RULE, HOWEVER, IS NOT APPLICABLE TO INSTRUMENTS, such as deeds of land, assignments of choses in action, bills of sale, indorsements of notes, etc., which, from their nature, are adapted merely to transfer title, in execution of an agreement which they do not profess to show. *Id.*
3. **PAROL EVIDENCE ADMISSIBLE TO SHOW WARRANTY WHERE NONE IS CONTAINED IN WRITTEN ASSIGNMENT.** — If a note and mortgage are transferred by a written assignment containing no words of warranty, parol evidence is admissible to show that the vendor warranted the mortgage security. *Id.*
4. **NO PEOPLE ARE BOUND TO ENFORCE OR HOLD VALID IN THEIR COURTS OF JUSTICE ANY CONTRACT** which is injurious to their public rights, or offends

their morals, or contravenes their policy, or violates a public law. *City Bank of New Haven v. Perkins*, 332.

5. **EQUITY WILL ANNUL CONTRACT FOR PURCHASE** of land entered into by an imbecile, without counsel, by which he agrees to pay twice the true value of the land, and is otherwise imposed upon by the fraudulent representations of the vendor. *Garrow v. Brown*, 450.
6. **CONTRACT MADE ON SUNDAY IS NOT VOID**, and does not violate the New York statute respecting the observance of the sabbath, unless it is to be performed on Sunday, in which case it would be invalid. *Merritt v. Harle*, 292.

See **ALTERATION OF INSTRUMENTS; CONSTITUTIONAL LAW; SALES.**

CONVERSION.

See **CO-TENANCY; NEGOTIABLE INSTRUMENTS**, 13.

CORPORATIONS.

1. **ACCEPTANCE OF CHARTER OF CORPORATION, IF ANY IS NECESSARY** where the charter creates a corporation *in presenti*, and appoints a board of directors, is sufficiently shown by the meeting and proceedings of the directors under the charter, though had without the limits of the state creating the corporation. *Ohio etc. R. R. Co. v. McPherson*, 128.
2. **STOCKHOLDER OF CORPORATION WHOSE DIRECTORS, NAMED IN CHARTER, HAVE MET AND TAKEN ACTION** without the limits of the state creating the corporation, is estopped from denying its corporate existence, where he has subscribed for its stock by its corporate name, paid installments called for by the directors, and attended the meetings of its stockholders and voted at elections. *Id.*
3. **DIRECTORS OF CORPORATION WHICH HAS BEEN DULY PUT INTO EXISTENCE**, who are elected at a meeting of the stockholders held without the limits of the state creating the corporation, but who accept their offices, and order a call for payment upon subscriptions to stock, become directors *de facto*, and their authority to act as such cannot be questioned collaterally by a stockholder in an action against him for the call thus made without showing a judgment of ouster against them in a direct proceeding by the government for that purpose. *Id.*
4. **FOREIGN CORPORATION IS RECOGNIZED IN FOREIGN JURISDICTION, NOT AS ACT OF RIGHT**, but as an act of grace; and a state may refuse to recognize a foreign corporation except upon its own conditions. *Erie Railway Co. v. State*, 226.
5. **BANKING BUSINESS IS ENTIRELY FOREIGN TO CHARTER OF CORPORATION** formed for the purpose of building and maintaining a railroad. *People ex rel. Attorney-General v. River Raisin and Lake Erie R. R. Co.*, 64.
6. **POWERS OF CORPORATION.** — Corporations may use the same incidental means to accomplish a given purpose that might be used by an individual in the absence of restriction, but where it is confined to one kind of business it cannot lawfully engage in enterprises foreign to that business. *Id.*
7. **ISSUE OF PAPER DESIGNED TO CIRCULATE IN FORM AND SIMILITUDE OF BANK NOTES** is an act of banking, and is unlawful for a corporation formed for the purpose of maintaining a railroad. *Id.*
8. **DUE ORGANIZATION AND RIGHT OF MUTUAL INSURANCE COMPANY TO ACT UNDER ITS CHARTER** is presumed in the absence of countervailing proof

in a suit by the company against one of its members to recover assessments, — if, indeed, the defendant is not, in such case, estopped from denying them. *National Mutual F. Ins. Co. v. Yeomans*, 610.

8. ABSENCE OF AFFIRMATIVE SHOWING IN MINUTE-BOOK OF MUTUAL INSURANCE COMPANY that one million dollars of insurance has been subscribed for, as required by the charter of the company to entitle it to insure, does not even tend to prove that such subscription has not been made. *Id.*
10. ASSESSMENT ON MUTUAL INSURANCE POLICY IS NOT INVALIDATED because before the issuance of such policy other policies had issued bearing written agreements signed by the secretary of the company, or by brokers who procured the policies, that the holders should not be liable to assessment, when it is proved that the agreements were unauthorized by the board of directors and repudiated by them, and that the holders were assessed and paid their assessments like other policy holders, and that the amount of the assessment on such subsequent policy was not at all affected by such agreements. *Id.*
11. BY-LAW OF CORPORATION PROVIDING FOR ADDITION OF TEN PER CENT PER MONTH to the amount of unpaid assessments is invalid where the charter provides that the amount of unpaid assessments — which, of course, includes simple interest — shall be recovered by action, for a by-law cannot add to the rule of damages fixed by the charter; but a verdict for the amount of assessments, with ten per cent per month interest, will be allowed to stand upon the condition that the plaintiffs release, upon the record, the excess of the verdict over the amount of the assessments and simple interest. *Id.*
12. CORPORATION MAY BE CHARGED FOR SERVICES RENDERED FOR ITS BENEFIT, although the employment was not formally authorized or ratified by the directors. The corporation will be bound if the services are rendered by persons who are employed by its officers or agents acting within the scope of their authority or where the employment is unauthorized, but the services are performed with the knowledge of the directors, and received by them without objection. *Hooker v. Eagle Bank of Rochester*, 351.

See CONSTITUTIONAL LAW, 1-7, 9-13; INTEREST, 1; LIBEL, 1; RECEIVERS.

COSTS.

See ASSIGNMENTS, 2; MALICIOUS PROSECUTION, 2.

CO-TENANCY.

1. CONVERSION BETWEEN CO-TENANTS. — Where plaintiffs raised a crop of grain on shares upon the land of defendant, and after it was cut, defendant hauled it off, had it thrashed and put in his granary, refused to give any of the grain to plaintiffs, and denied having any for them, this absolute denial of the rights and title of his co-tenants amounts to a conversion. *Fiquet v. Allison*, 54.
2. DOCTRINE THAT THERE CAN BE NO CONVERSION BETWEEN CO-TENANTS applies to things which in their nature are so far indivisible that the share of one cannot be distinguished from that of another, and not to such articles as grain or money, which are susceptible of convenient division. *Id.*

- 2. ASSUMPSIT FOR CONVERSION, WITHOUT PROOF OF SALE.** — Where plaintiffs raised a crop of grain on shares upon defendant's land, and defendant takes possession of the entire lot, and refuses to fulfill his contract of giving up a portion to plaintiffs, and his conduct shows a determination to keep their share, he is bound to pay for it, and plaintiffs may, by their consent, convert the transaction into a sale, and maintain *assumpsit* for the price of their grain. *Id.*

See PARTITION.

COVENANTS.

- 1. UPON COVENANT WHICH RUNS WITH LAND** an action lies for or against the assignee at common law, though he is not named in the covenant. But it is otherwise if the covenant concerns something not in esse at the time, but to be built after the demise is made. *Conover v. Smith*, 247.
- 2. TO MAKE DEFENDANT LIABLE ON COVENANT** there must be privity between him and plaintiff. The covenant must respect the thing granted or demised. *Id.*

See WITNESSES, 6.

CRIMINAL LAW.

- 1. PRESENCE OF ACCUSED DURING PROGRESS OF TRIAL.** — Prisoner may voluntarily absent himself from the court-room during a portion of the progress of his trial. Consequently, where the jury in a trial for felony returned and stated that they had agreed upon a verdict, but had not reduced it to writing, and were sent back to prepare a written verdict, and where, when they returned, the prisoner was not present, and the jury returned their verdict, were polled by the prisoner's counsel and discharged before his return, the prisoner will not be given a new trial, unless he show that his absence was enforced. *Hill v. State*, 736.
- 2. IT IS NOT ENOUGH TO SHOW THAT ACCUSED WAS ABSENT FROM COURT-ROOM** during the rendition of the verdict in his case. The burden is on him to show error, and he should make it appear that he was deprived of the right to be present, not merely that he was not present. *Id.*
- 3. EVERY PERSON TRIED FOR FELONY HAS RIGHT TO BE PRESENT AT TRIAL, AND AT WHOLE OF IT,** and if he should be deprived of his right without his consent, he will be given a new trial. *Id.*
- 4. INSTRUCTION ENCROACHING UPON PROVINCE OF JURY.** — It was essential to establish the identity of certain notes found where the prisoner was said to have concealed them with the ones charged to have been stolen. The court in its charge said that "one twenty-dollar note was positively identified": *Held*, error as the question of identity, no matter what the evidence was for the jury. *Id.*
- 5. LOST INDICTMENT CANNOT BE REPLACED** by affidavit of the clerk or order of the court. Where the indictment is lost even after the arraignment the defendant cannot be tried. Provisions of chapter 180 of code allowing papers in any cause lost or destroyed to be replaced by authenticated copies relate only to civil matters. *Bradshaw v. Commonwealth*, 722.
- 6. COMPETENT WITNESS IN CASE OF ABORTION, WHO IS.** — If person being tried on an indictment for giving medicine to produce a miscarriage tries to show that another was the father of the child of which the prosecutrix was encephalic, the prosecution may call the latter to prove that he had no intercourse with the woman. *Dunn v. People*, 319.

7. WOMAN, TO WHOM MEDICINES WERE ADMINISTERED TO PRODUCE MISCARRIAGE is victim rather than an accomplice; even if deemed accomplice she is competent for prosecution as a witness against the accused; and her testimony does not require corroboration where it establishes satisfactory proof of guilt. *Id.*
8. WHILE NOT GENERALLY DISCREET FOR JURY TO CONVICT UPON UNSUPPORTED TESTIMONY OF ACCOMPLICE, it is not the law that a conviction upon such testimony can in no case be had. *Id.*
9. TO CONSTITUTE DWELLING-HOUSE IN SENSE NECESSARY TO MAKE UNLAWFUL BREAKING BURGLARY, no one need be in the house at the time, provided the owner had the intention of returning. *State v. Meerhouse*, 109.
10. HOUSE CEASES TO BE DWELLING-HOUSE in sense necessary to make unlawful breaking burglary, if the owner locks it up and leaves it with a settled purpose not to return. *Id.*
11. FACT THAT PART OF STOLEN PROPERTY WAS FOUND UPON PERSON OF ONE engaged in the common design, aiding and abetting the defendant, is competent evidence on the trial of an indictment for larceny. *State v. Wohlman*, 117.
12. EVIDENCE THAT STOLEN PROPERTY WAS FOUND in the possession and house of the accused, where he and his wife alone resided, is competent as tending to establish his guilt. *State v. Johnson*, 434.
13. POSSESSION OF STOLEN PROPERTY, although not so recent as to raise a legal presumption of the taking, is nevertheless evidence to be considered in connection with other evidence upon that point. *Id.*
14. KILLING IS MURDER, AND NOT MANSLAUGHTER, where parties fight by consent with deadly weapons, and the accused, having his weapon ready, takes his adversary at a disadvantage, and stabs him in the side while he is in the act of turning around to face the accused, and before he is on his defense. *State v. Ellick*, 442.
15. KINDS OF MANSLAUGHTER STATED AND EXPLAINED. *Id.*
16. IN MUTUAL COMBAT WITH DEADLY WEAPONS, an offer to strike does not amount to legal provocation. *Id.*
17. ON TRIAL FOR MURDER, WHERE INTENTIONAL KILLING WITH DEADLY WEAPON IS ADMITTED, an instruction is proper which assumes as true what defendants' witnesses have sworn to, and states that such testimony does not mitigate the crime to manslaughter. *Id.*
18. FACT OF HOMICIDE MUST BE PROVED BY STATE; but if found or admitted, the onus of showing justification, excuse, or mitigation is upon the accused, and the jury must be satisfied that the matter offered in mitigation is true. *Id.*
19. ORIGINATOR OF MALICIOUS ASSAULT, WHO CONTINUES IN CONFLICT WHICH ENSUES, is not justified in taking the life of his adversary, however necessary it may be to save his own, or to whatever extremity he may be reduced. But when he wholly withdraws from the conflict, and has in good faith retreated to a place of apparent security, he is again remitted to his right of self-defense. *Stoffer v. State*, 470.

See SEDUCTION, 1.

CUSTOMS.

See INSURANCE, 7.

DAMAGES.

1. **FACT OF PECUNIARY LOSS, AND AMOUNT THEREOF, ARE LEFT TO BE DETERMINED BY JURY** under instruction that they may, in estimating the pecuniary injury in an action by a father, as administrator of his wife, to recover damages for his wife's death, caused by defendants' negligence, take into consideration maternal culture and education as damages; because such instruction does not imply that the children are necessarily and inevitably subjected to such a loss. *Tilley v. Hudson River R. R. Co.*, 297.
 2. **PECUNIARY DAMAGES ARE NOT RESTRICTED TO MINORITY OF CHILDREN.** — In an action by a father, as administrator of his wife, to recover damages for his wife's death, caused by defendants' negligence, there is no sufficient legal reason for limiting the pecuniary damages caused by want of maternal culture and education to the minority of the children, if the jury are legally persuaded that they will continue after that age. *Id.*
 3. **PROSPECTIVE DAMAGES ARE ALLOWABLE IN ESTIMATING PECUNIARY INJURIES.** — While the jury, in an action by a father, as administrator of his wife, who was killed by defendants' negligence, must assess the damages with reference to the pecuniary injuries sustained by the next of kin in consequence of the mother's death, they are not limited to the losses actually sustained at the precise period of her death, but may include, also, prospective losses, provided they are such as the jury believe, from the evidence, will actually result to the next of kin as the proximate damages arising from the wrongful death. *Id.*
 4. **BUSINESS CAPACITY OF MOTHER ADMISSIBLE IN ESTIMATING PECUNIARY DAMAGES.** — In an action by a father, as administrator of his wife, who was killed by defendants' negligence, evidence in relation to the capacity of the mother to conduct business and make money is proper, as aiding the jury in arriving at a correct result in regard to the pecuniary benefit which the mother was to her children, and her capacity to bestow such training, instruction, and education as would be pecuniarily serviceable to the children in after life. *Id.*
 5. **DAMAGES ARISING FROM DEATH OF WIFE AND MOTHER.** — In an action by a father as administrator of his wife, who was killed by defendants' negligence, the jury may, in estimating the pecuniary injury, take into consideration the nurture, instruction, and physical, moral, and intellectual training which the mother gave to her children. *Id.*
 6. **EVIDENCE AS TO VALUE OF SERVICES OF COUNSEL, or the amount of other expenses incident to the prosecution of an action of trespass, or on the case for a tort, is inadmissible for the purpose of laying a foundation for those particulars as items of damage.** *Fairbanks v. Witter*, 765.
 7. **JURY CANNOT TAKE INTO ACCOUNT VALUE OF SERVICES OF COUNSEL, or other expenses incident to the prosecution of an action of trespass, or on the case for a tort, in assessing damages, either actual or punitive.** *Id.*
 8. **VERDICT OF JURY WHICH INCLUDES VALUE OF SERVICES OF COUNSEL, or other expenses incident to the prosecution of an action of trespass, or on the case for a tort, is irregular and erroneous.** *Id.*
- See FALSE IMPRISONMENT; INTEREST, 2; NEGOTIABLE INSTRUMENTS, 13; TRESPASS, 3.

DEBTOR AND CREDITOR.

1. **CREDITOR, TO OBTAIN RELIEF AGAINST FRAUDULENT DISPOSITION OF PROPERTY** by debtor, must show himself to have been a creditor at the
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time the act was done which he claims to be in fraud of his rights. *Stow v. Meyers*, 104.

2. **LIABILITY OF OBLIGOR IN BOND ATTACHES BY MAKING OF INSTRUMENT**, and he is then a debtor, so as to prevent the disposition of his property to the injury of the obligee until he has complied with the conditions of the bond. *Id.*

DEEDS.

1. **DELIVERY OF DEED—WHEN PRESUMED TO HAVE BEEN.**—Where a deed appears to have been acknowledged three days after its date, in the absence of proof it will be presumed to have been delivered after the acknowledgment, as such is the usual practice with reference to instruments intended for record. *Blanchard v. Tyler*, 57.
2. **INSPECTION OF DEED CHARGES PARTY WITH NOTICE OF THOSE FACTS ALONE** which its contents import. *Coobe v. Bremond*, 628.
3. **NO ALTERATION OF DEED AFTER TITLE HAS PASSED THEREUNDER**, by whomsoever made or with whatever purpose, can revest the grantor with title. *Alexander v. Hicker*, 118.
4. **REGISTER'S DEED UPON SALE OF LAND FOR TAXES MAY BE PROPERLY REJECTED** as evidence for uncertainty of description; notwithstanding the statute makes it *prima facie* evidence of title in the purchaser. *Id.*
5. **PAROL EVIDENCE EXPLAINING SUBJECT-MATTER OF CONVEYANCE**, its condition and peculiarities, does not contradict the deed. *Wilson v. Cochran*, 574.
6. **ONLY SUCH CREDITORS AS HAVE SECURED SOME CHARACTER OF LIEN UPON LAND** before notice of an unrecorded deed are within the registration law protecting "all subsequent purchasers and creditors." *Ayers v. Duprey*, 657.
7. **CONVEYANCE OF INTEREST IN LANDS IS REQUIRED TO BE BY WRITING, SIGNED AND SEALED**, to be of any validity, under the New Hampshire Revised Statutes, chapter 130, section 3, but it is good as against the grantor and his heirs, without being witnessed, acknowledged, or recorded. *Kingsley v. Holbrook*, 174.
8. **CONVEYANCE OF INTEREST IN LANDS CANNOT BE DEFEATED**, under the New Hampshire Revised Statutes, chapter 131, section 2, by any agreement, unless it be inserted in the condition of the conveyance; and an accompanying writing, signed by the grantee, and purporting to be a defeasance, amounts simply to a contract, which may be modified by a parol agreement, and upon which the grantee is liable if he does not perform its conditions. *Id.*
9. **WHETHER WRITING IS EXECUTED CONVEYANCE OR ONLY EXECUTORY** DEPENDS ON INTENTION of the parties, as collected from the instrument itself; where it is doubtful upon its face, light may be shed upon it by the attending circumstances. *Borts v. Borts and Wife*, 603.
10. **AGREEMENT FOR SALE OF LAND IN CONSIDERATION OF SUM OF MONEY TO BE PAID ANNUALLY** during the lifetime of the grantor and his wife for their support, containing a provision for the increase or reduction of such annual sum should it be too little or too much for that purpose, which contains the formal words of a present deed of conveyance distinctly conveying the land, and which is duly executed and acknowledged, possession being delivered under it, is an executed conveyance, vesting the title in the grantee; and the fact that such grantee is a married woman will not prevent the estate from vesting in her by the conveyance, though encumbered with a condition. *Id.*

11. LAND DESCRIBED IN DEED AS "SOUTH HALF" of a certain quarter-section may be shown by extrinsic evidence to be one half in area of said section, and not one half according to the government survey. *Prentiss v. Brewer*, 730.
12. WHERE LAND IS CONVEYED IN SECTIONS OR SUBDIVISIONS OF SECTIONS, IT IS PRESUMED that reference was had to the public surveys of the United States; but where land is conveyed in fractions of sections, as the south half of a certain section, extrinsic evidence is admissible to show that one half in area was meant. *Id.*
13. TOWN PLATS, UNDER STATUTE, ARE INSTRUMENTS OF EQUAL SOLEMNITY WITH DEEDS. They are acknowledged and recorded in the same manner, and purchasers are supposed to look only to them to ascertain the extent of the rights and titles of the owners of lots. *Weisbrod v. Chicago etc. Ry Co.*, 743.

See BOUNDARIES; EXECUTIONS, 7, 8, 18.

DEPOSITIONS.

1. CONTRACT REFERRED TO BY WITNESS IN HIS DEPOSITION NEED NOT BE PRODUCED if the interrogatories do not call for its terms or mention the contract. *Hooker v. Eagle Bank of Rochester*, 351.
2. DOCUMENTS, TESTIFIED IN DEPOSITION TO HAVE BEEN SEEN BY WITNESS, NEED NOT BE PRODUCED, where the evidence shows that they were left in the hands of the adverse party, giving rise to the presumption that they were at the time in his custody. *Id.*
3. RULE THAT INTERROGATORIES MUST BE CROSSED to give both parties the right to introduce the answers to them in evidence does not apply to interrogatories addressed by one party to the suit to the other party. *Hadley v. Upshaw*, 654.
4. PARTY CANNOT BE PERMITTED TO ADDRESS INTERROGATORIES TO OPPOSITE PARTY, and then decline to read his answers, and thereby deprive the party answering of the right to read the answers in evidence. *Id.*

DOWER.

See PARTITION, 1.

EASEMENTS.

1. RIGHT TO USE ALLEY RUNNING BETWEEN TWO LOTS OF LAND, and from one street to another, and between other lots of land, such alley having been dedicated to the use of lot-owners by a former owner of the property, constitutes an easement which, if continuous, will not be extinguished by merger of the title of the said two lots in one owner, but will pass to purchasers and holders of other lots upon the alley; and the purchaser of such two lots will have no right to close the alley, though the measurements in his deeds extend to the center of the alley, and embrace the whole of it between his lots; but the consent of all the owners of lots bounding on it will be necessary to authorize it to be closed. *McCarty v. Kitchenman*, 538.
2. OWNER OF LAND IS ENTITLED TO HAVE IT SUPPORTED IN ITS NATURAL CONDITION by the land of his adjoining proprietor, and if the latter removes such support to the injury of the former he is liable for the damages so occasioned. *Beard v. Murphy*, 693.

2. **OWNER OF LAND CANNOT CLAIM SUPPORT OF ADJOINING SOIL** for any artificial structure he may erect upon his land, and which increases the lateral pressure. *Id.*

See SERVITUDES.

EJECTMENT.

1. **IN VERMONT, HEIR MAY MAINTAIN EJECTMENT** when such period has elapsed after administration was granted upon the estate as is sufficient to raise the presumption that the time for payment of debts has expired, and the administrator's lien has been satisfied. *Austin v. Bailey*, 703.
2. **IN EJECTMENT UNDER CODE, DEFENDANT MAY AVAIL HIMSELF OF ANY LEGAL OR EQUITABLE DEFENSE.** *Prentiss v. Brewer*, 730.

ELECTIONS.

1. **WANT OF NOTICE OF ELECTION DOES NOT INVALIDATE IT.** — Notice of election, which omits to state that there will be an election for a certain office, in which there is a vacancy, does not invalidate the election of the person who received the majority of votes for that office. *People ex rel. Speed v. Hartwell*, 70.
2. **STATUTE REQUIRING CLERK TO GIVE NOTICE OF HOLDING OF ELECTIONS AND OFFICERS TO BE VOTED FOR** is merely directory, and his omission to give notice of an election to a particular office does not invalidate the right to the office of the person receiving the largest number of votes therefor. *Id.*
3. **THERE IS NO DIFFERENCE BETWEEN ELECTION FOR FULL TERM AND TO FILL VACANCY**, with regard to the necessity of giving the statutory notice of holding the election. *Id.*
4. **ELECTOR IS PRESUMED TO HAVE COGNIZANCE OF PROCEEDINGS OF COMMON COUNCIL**, WHICH ARE PUBLISHED in the official paper of the corporation; and where they have declared a vacancy in an office, he will be presumed to know that there will be an election to fill such vacancy as well as to elect officers to succeed those whose terms are about to expire. *Id.*

EMINENT DOMAIN.

1. **PROCEEDINGS TO CONDEMN LAND, WHEN CAN BE ABANDONED.** — When public officers have proceeded under statutory authority to condemn land for public uses, and an appraisement of the value of the lands and damages has been made, such proceedings may then be discontinued without the consent of the land-owners, if the report has not been confirmed by the court. *In Matter of Water Commissioners of Jersey City*, 199.
2. **PROCEEDINGS TO CONDEMN LAND, WHEN CANNOT BE ABANDONED.** — When public officers, proceeding under a statute to condemn land for public use, have the value of the land and the amount of damage appraised, if this report is confirmed by the court, cannot then discontinue the proceeding without the consent of the land-owners, but must proceed and make compensation. *Id.*
3. **RAILROAD COMPANY AUTHORIZED TO ACQUIRE LANDS** for the use of their road by condemnation, and required to make payment or tender of compensation to the owners before occupying the land, cannot construct their road across or upon a highway, without making compensation to the owner of the soil so occupied. *Hinchman v. Paterson Horse R. R. Co.*, 252.

4. **OWNER OF SOIL UNDER HIGHWAY OCCUPIED BY RAILROAD COMPANY** cannot be deprived of his property or prejudiced in any right therein without compensation, even by express authority of the legislature, under a constitution declaring that private property shall not be taken for public use without just compensation. *Id.*
5. **LIABILITY OF NEW COMPANY TO MAKE COMPENSATION FOR LAND TAKEN BY OLD COMPANY FOR RAILROAD PURPOSES.** — A railroad company appropriated plaintiff's land for its roadway, and damages were assessed by the commissioners under the company's charter. Plaintiff recovered judgment, which was never paid. Subsequently the railroad was sold under a mortgage, which covered the company's right of way, to persons who organized a new company under the statute, and continued to operate the road, using the track as laid across the plaintiff's land. Under these peculiar facts it was held that the plaintiff had a right of action on the judgment against the new company. *Pfeifer v. Sheboygan etc. R. R. Co.*, 751.
6. **SAME.** — IF SUCH NEW COMPANY HAD ASSERTED NO RIGHTS UNDER ITS PURCHASE, except those which the mortgage sale gave as complete and perfect against all paramount claims, it would not have been liable to the plaintiff upon the mere ground that he had a judgment against the old company. *Id.*
7. **SAME — ELECTION AND EFFECT THEREOF.** — BUT SUCH TAKING OF POSSESSION OF PLAINTIFF'S LAND, and asserting a right to use it, constituted a plain election by the new company to adopt the original taking and to receive the benefit of it. It therefore subjected itself to the conditions under which that right existed in favor of the old company. *Id.*
8. **SAME — ESTOPPEL.** — NEGLIGENCE FOR UNREASONABLY LONG TIME TO PAY DAMAGES ADJUDGED TO PLAINTIFF might, perhaps, justify him in treating either company as a trespasser *ab initio*, while they were using his land; but the old company was estopped from claiming the character of a mere wrong-doer after proceedings had to condemn the land; and the new one, after having entered and asserted the rights of the old, thus ratifying and adopting the original taking, was equally estopped. *Id.*

See HIGHWAYS, 3.

EQUITY.

1. **IT IS GENERAL RULE IN EQUITY PLEADING THAT ALL PERSONS ARE NECESSARY PARTIES** to a suit whose interests are to be affected by it. *Allison v. Shilling*, 622.
2. **BILL IS DEMURRABLE ON GROUND OF MISJOINDER** of parties where the complainants are owners of several and distinct parcels of land, and have no common interest, but each seeks relief for special injury to his own property, under the impression that the nuisance complained of is a grievance common to all of the land-owners, and therefore that all might be properly joined. *Hinchman v. Paterson Horae R. R. Co.*, 252.
3. **AS GENERAL RULE, OBJECTION TO BILL** on ground of misjoinder should be made by demurrer. *Id.*

See ASSIGNMENTS, 1; CONTRACTS, 5; EJECTMENT, 2; LANDLORD AND TENANT, 13; NUISANCE, 3; PARTNERSHIP, 4; SHERIFFS, 1; SPECIFIC PERFORMANCE; TRESPASS, 1.

ESTATES OF DECEDENTS.

1. **ORDER OF SALE OF LAND OF DECEDENT MADE WHEN CIRCUMSTANCES DO NOT EXIST**, which under the law authorize the court to make the order, is without jurisdiction or authority. *Withers v. Patterson*, 643.

2. **HEIR, UPON DEATH OF ANCESTOR, HAS VESTED INTEREST IN ESTATE**, which he may immediately convey by deed, and his grantee holds the land, as the heir did, subject to the administrator's lien. *Austin v. Bailey*, 703.
- See **EXERCISEMENT**, 1; **EXECUTORS AND ADMINISTRATORS**; **JURISDICTION**, 6; **PARTNERSHIP**; **WILLS**.

ESTOPPEL.

1. **NOT ESTOPPEL**. — Declarations of a garnishee that he was indebted to the defendant in a large sum in consequence of which a suit was commenced against defendant, and the debt attached, does not estop such garnishee from denying that he was indebted to the defendant at the time the attachment was issued. *Phillipsburgh Bank v. Palmer*, 193.
2. **TO CONSTITUTE ESTOPPEL IN PARI**, there must be an admission intended to influence, or of such a nature as will naturally influence, the conduct of another, and so change his condition as materially to injure him, if the party making it is allowed to retract it. And the estoppel must not be carried beyond the limits of the injury, so as, instead of preventing a fraud, the enforcement of it will produce a greater injury than it was intended to prevent. *Id.*
3. **WHERE ONE ASSERTS IN SINGLE SENTENCE THAT REPRESENTATION WAS MADE TO HIM AND THAT HE BELIEVED IT**, the natural meaning of it is that he believed it because he relied on the truth of the statement, and not upon information that he might have derived from some other source. *Hahn v. Doolittle*, 757.
4. **ALLEGATION IN COMPLAINT THAT PLAINTIFF PURCHASED NOTE AND MORTGAGE ON FAITH OF DEFENDANT'S REPRESENTATIONS IS SUFFICIENT** if in the following language: "That defendant represented to this plaintiff that said mortgage was good, and a valid security for the payment of said note, and this plaintiff supposed and verily believed, at the time he bought the same as aforesaid, the said mortgage to be good, and that it was a valid and sufficient security," etc. But the idea might be more distinctly expressed. *Id.*
5. **TO ESTABLISH ESTOPPEL IN PARI IT MUST BE SHOWN**, that the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give, or the title he proposes to set up; that the other party has acted upon or been influenced by such act or declaration; and that the party will be prejudiced by allowing the truth of the admission to be disproved. *Brown v. Bowen*, 406.
6. **IT IS FOR JURY TO SAY, WHETHER ON FACTS, ESSENTIAL PARTS OF ESTOPPEL ARE PROVED**, in the absence of proof of the effect of the admission on the party setting up the estoppel. *Id.*
7. **MAN WILL BE BOUND BY THAT WHICH WOULD HAVE BOUND THOSE UNDER WHOM HE CLAIMS**, *quoad* the subject-matter of the claim; for *qui sentit commodum sentire debet et onus*. *Pfeifer v. Sheboygan etc. R. R. Co.*, 751.
8. **NO MAN CAN, EXCEPT IN CERTAIN CASES REGULATED BY STATUTE LAW AND LAW MERCHANT, TRANSFER TO ANOTHER BETTER RIGHT THAN HE HIMSELF POSSESSES**; the grantee shall not be in a better position than he who made the grant; and therefore privies in blood, law, and estate shall be bound by and take advantage of estoppels. *Id.*

3. IF PERSON ACCEPTS ANYTHING WHICH HE KNOWS TO BE SUBJECT TO DUTY OR CHARGE, it is rational to conclude that he means to take such duty or charge upon himself, and the law may very well imply a promise to perform what he has so taken upon himself. *Id.*
10. MAKING, RECORDING, AND PERMITTING SALE OF LOTS ACCORDING TO TOWN PLATS CREATES ESTOPPEL upon adjoining owners from claiming a greater interest in the soil of streets than is indicated upon the plats, where the purchaser has no actual notice of any further claim. *Weisbrod v. Chicago etc. R. R. Co.*, 743.
11. EFFECT OF RECORDING TOWN PLATS, AND MAKING SALE OF LOTS ACCORDING TO THEM — ESTOPPEL AS TO ORIGINAL PROPRIETOR. — Where A and B, as original proprietors, lay out their land into city lots, and the town plats indicate the center of a street as the line of original division, but it turns out on actual measurement that the street is wider than indicated, and that there is an intervening strip in the middle of the street claimed by A, then A and those claiming title under him to lots on one side of the street are estopped from setting up title beyond the center line of that street as against persons who purchased lots on the opposite side of the street after the plats were recorded, and without actual notice of A's title to the strip of land in the center of the street not indicated by the plats. *Id.*

See EMINENT DOMAIN, 5-8; RIPARIAN RIGHTS, 6, 9.

EVIDENCE.

1. NOTES OF TESTIMONY TAKEN BY COUNSEL ON FORMER TRIAL of cause between the same parties may be read in evidence, where he testifies that "they contain the whole of the substance of the examination in chief, but that the cross-examination is not so full," and that "he thinks he took down the testimony in chief, and some of the cross-examination, — all that was material." *Philadelphia etc. R. R. Co. v. Stearns*, 544.
2. TRIAL COURT MAY EXERCISE REASONABLE DISCRETION IN APPLYING OR RELAXING RULES FOR INTRODUCTION OF TESTIMONY, according to circumstances apparent only to the court itself, and a strict uniformity, at all times, is not to be expected. *Runyan v. Price*, 458.
3. WHEN CLEARLY SHOWN THAT WITNESS HAS COMMITTED PERJURY IN ONE MATERIAL POINT, the testimony must be wholly rejected, and cannot be relied upon for any purpose whatever, in accordance with the maxim, *Falsus in uno, falsus in omnibus*. *Stoffer v. State*, 470.
4. ADMISSIBILITY OF EVIDENCE IS QUESTION FOR COURT TO DETERMINE. It is error to leave the jury to decide the question of admissibility, and to instruct them to consider the evidence or not, as they find the one way or the other. *State v. Dick*, 439.

See ATTORNEY AND CLIENT, 4, 5; CONTRACTS, 1-3; DEEDS, 4, 5; DEPOSITIONS; INSANITY; INSURANCE, 7, 8; JUDGMENTS, 4, 14; MALICIOUS PROSECUTION, 3-5; PLEADING AND PRACTICE; SEDUCTION, 1; SHERIFFS, 4; VENDOR AND VENDEE; WILLS, 11; WITNESSES.

EXECUTIONS.

1. IT IS NECESSARY TO VALIDITY OF LEVY OF EXECUTION ON REAL ESTATE that the execution and the officer's return thereon should be recorded in the proper office within the life of the execution and before the return. *Little v. Sleeper*, 697.

2. **EXECUTION CREDITOR HAS NO LIEN UPON PERSONAL PROPERTY OF HIS DEBTOR**, under the Wisconsin statute, until it is seized on execution. *Knoss v. Webster*, 779.
3. **EXECUTION LIEN TAKES EFFECT FROM DATE OF LEVY AND BY VIRTUE THEREOF**; it is confined to the execution levied, and can have relation to no other. *Id.*
4. **LIEN CREATED BY SEIZURE OF PROPERTY UNDER EXECUTION IS PRIOR AND SUPERIOR** to that of every execution subsequently levied, and cannot be defeated by such subsequent levy, though it is made upon a senior execution. *Id.*
5. **SHERIFF'S DUTY IS TO LEVY AND SATISFY EXECUTIONS ACCORDING TO THEIR SENIORITY**. Having several executions against the property of the same debtor, he must levy the one first placed in his hands. And this rule is not affected by the fact that the junior execution creditor may be more successful than the sheriff in discovering property of the debtor subject to sale on execution. *Id.*
6. **FAILURE TO APPRAISE LAND ON DAY OF SALE, UNDER EXECUTION**, as required by plain terms of the statute, is not obviated by a previous appraisal, and renders the sale irregular, erroneous, and voidable, but not void. *Ayres v. Duprey*, 657.
7. **SHERIFF'S DEED CANNOT BE IMPEACHED IN COLLATERAL ACTION** because of irregularity in the sale, even though the plaintiff in execution is one of the parties to the collateral suit. *Id.*
8. **TITLE, IF ANY, ACQUIRED BY PLAINTIFF IN EXECUTION UNDER SHERIFF'S DEED, IS DIVESTED** by the reversal of an order confirming the sale after the execution of the deed and before any legal conveyance to a third party. The wife of such purchaser, having at most only a contract for a conveyance from him, made after the execution of the sheriff's deed and before the reversal, in consideration of her choses and moneys previously reduced to his possession, cannot, in equity, compel a conveyance of the legal title by the defendant in execution. *McBain v. McBain*, 478.
9. **TITLE OF BONA FIDE PURCHASER FOR VALUUM UNDER JUDICIAL SALE**, where the judgment and order for sale remain in full force and unsatisfied of record, cannot be defeated by parol proof of a payment of the debt by the defendant in execution to the plaintiff before the sale. *Nichols v. Dissler*, 219.
10. **BONA FIDE PURCHASERS AT EXECUTION SALES ARE AS FULLY PROTECTED BY REGISTRATION LAWS** against prior unrecorded deeds, according to the better authority, as those who claim by direct and immediate conveyances. *Ayres v. Duprey*, 657.
11. **EXECUTION CREDITOR WHO PURCHASES LAND OF DEBTOR AT EXECUTION SALE**, though not a *bona fide* purchaser, is protected against a prior unrecorded deed from the debtor by virtue of registration laws which protect "all subsequent purchasers and creditors," provided he had no notice of the deed before his judgment became a lien on the property. *Id.*
12. **RULE THAT MERE IRREGULARITY WILL NOT RENDER SALE UPON EXECUTION INVALID**, if the execution be valid, has no application where a sale has been made of something which the sheriff had no authority to sell. And the attempt to obtain possession of the thing sold in such cases may be resisted by showing that the sheriff had no authority to make the sale. *Harris v. Murray*, 268.

13. PURCHASER AT SHERIFF'S SALE OF INTEREST OF SPECIAL PARTNER IN LIMITED PARTNERSHIP IS BOUND TO KNOW that such sale is illegal, and it is therefore unnecessary for the special partner, though present, to give any notice. *Id.*
14. REVERSAL OF JUDGMENT FOR ERROR WILL NOT AVOID SALE UNDER EXECUTION, if such sale was made to a stranger; but where the sale was made to the plaintiff in the execution it is otherwise. *Cornith v. State Bank*, 793.
15. NEGLIGENCE OF CLERK TO AFFIX SEAL OF COURT TO WRIT OF EXECUTION DOES NOT RENDER IT VOID, nor the sale made under it. *Id.*
16. WRIT OF EXECUTION MAY BE AMENDED WHERE IT HAS NO SEAL, by the court's ordering the seal to be affixed. *Id.*
17. PURCHASER'S TITLE UNDER EXECUTION MERELY ERRONEOUS WILL BE PROTECTED. *Id.*
18. WHETHER SHERIFF'S DEED FOR PROPERTY SOLD UNDER DEFECTIVE WRIT OF EXECUTION HAS BEEN EXECUTED OR NOT makes no difference. The purchaser's title will be protected as well before as after the giving of the sheriff's deed. *Id.*
19. PLANO OF LESS VALUE THAN TWO HUNDRED DOLLARS CANNOT BE RETAINED BY DEBTOR AS EXEMPT under a statute exempting personal property from sale on execution, and which, after specifying certain articles of household furniture, adds the following: "And all other household furniture not herein enumerated, not exceeding two hundred dollars in value." *Tanner v. Billings*, 755.
20. THAT TEACHING MUSIC WAS ONE'S BUSINESS, at the time when his piano was attached, does not appear from the fact that he had taught music for pay within three months prior to the time of the seizure. *Id.*

See JUDGMENTS; WRITS.

EXECUTORS AND ADMINISTRATORS.

1. PURCHASER AT ADMINISTRATOR'S SALE IS SOMETIMES SAID NOT TO BE BOUND to look beyond the judgment of a court of competent jurisdiction, and it is often said that an order of sale and a sale under the order are effectual to pass the title to the purchaser; but it is always understood that the jurisdiction of the court has been rightfully called into exercise, and that the order of sale is a valid order. *Withers v. Patterson*, 643.
2. ANNUAL SETTLEMENTS OF EXECUTORS AND ADMINISTRATORS ARE NOT CONCLUSIVE upon the parties interested in the estate; and at the final settlement they may show errors in the previous annual settlements, which may be corrected by the probate court. *Picot v. Biddle's Ex'r*, 134.
3. BONA FIDE PURCHASER AT ADMINISTRATOR'S SALE, MADE IN PURSUANCE OF ORDER which the court had the power to make, takes a good title, which cannot be impeached collaterally, and is not affected by any irregularities in the proceedings of the court. *Withers v. Patterson*, 643.
4. WHERE GRANT OF ADMINISTRATION IS VOID, ORDER OF SALE IS VOID, and a purchaser thereunder acquires no title, all proceedings in the course of such administration being void and collaterally attackable. *Id.*
5. ORDER OF SALE IN COURSE OF RIGHTFUL ADMINISTRATION IS VOID and collaterally attackable where the record shows that the facts empowering the court to order a sale did not exist; but if the record is silent such facts will be presumed to have existed. *Id.*

6. **POWER OF COURT TO GRANT LETTERS OF ADMINISTRATION** depends upon the facts as they exist at the time the letters are granted; and if the court had not this power, none of the proceedings in the course of such administration can have any validity in favor of any person on the ground that he was ignorant of the want of power in the court to grant the letters of administration. *Id.*
7. **RECORDS OF PROBATE COURT SHOW THAT ESTATE HAS BEEN FULLY ADMINISTERED** for all purposes except partition and distribution, notwithstanding the final account of the administrator shows a trifling balance due him from the estate; for his discharge without asking payment raises the presumption that he remitted the debt to the estate, and the rule *de minimis non curat lex* applies. *Id.*
8. **WHERE RECORD OF PROBATE COURT SHOWS THAT ESTATE HAS BEEN FULLY ADMINISTERED**, except for purposes of partition and distribution, and a second administration is granted, the record of which repels the presumption of its necessity, an order of sale made in the course of such administration is void, and a sale thereunder confers no title upon the purchaser. *Id.*

See JUDGMENTS, 1.

EXEMPTIONS.

See EXECUTIONS, 19, 20; HOMESTEADS.

FALSE IMPRISONMENT.

1. **DAMAGES FOR ARREST.** — In actions for an arrest, the jury are entitled and required to find such general damages as they deem appropriate under the circumstances, for the arrest and detention, as well as any special damages which are proven to their satisfaction, and it is error for the court to confine the jury to damages for mere loss of time in consequence of the arrest. *Page v. Mitchell*, 75.
2. **COURT CAN NEVER CONFINE JURY TO EITHER NOMINAL OR SPECIAL DAMAGES, IF THERE HAS BEEN REAL PERSONAL INJURY**, and every deprivation of liberty is so regarded. It is for the jury themselves to determine whether the circumstances should reduce the recovery to a minimum. Consequently, it was erroneous by instruction to limit the damages in an action for an arrest to such a sum as would be "sufficient to pay the plaintiff for his time while he was being arrested and taken to the jail." *Id.*

FORCIBLE ENTRY AND DETAINER.

PERSON WHO HAS BEEN TURNED OUT OF POSSESSION OF LAND by a writ issuing by virtue of a decree to which he was in no sense a party may proceed by action of forcible entry and detainer to recover the possession; and ought not to be driven to an action in which the title may be called in question, nor even to a motion in the court from which the writ issued. *Laird v. Winters*, 620.

FRAUD.

1. **NO MAN CAN ACQUIRE RIGHT BY HIS OWN FRAUD TO SUSTAIN ACTION IN ANY COURT.** *City Bank of New Haven v. Perkins*, 332.
2. **ACTION ON NOTE OBTAINED BY FRAUD MAY BE DEFEATED ON THAT GROUND**, if a defendant can show that the plaintiff obtained the note by his own fraudulent act, although he may be liable to pay the note to the true owner. *Id.*

See VENDOR AND VENDEE, 8.

GARNISHMENT.

See ATTACHMENT, 5.

GROWING CROPS.

See CO-TENANCY, 3; STATUTE OF FRAUDS, 8.

GROWING TREES.

GROWING TREES ARE SEVERED IN LAW FROM LAND, AND BECOME PERSONAL PROPERTY without an actual severance, so that they may thereafter be sold like any other personal property, where the owner of the lands, by a valid deed, sells the trees to a third person, or, it seems, where he sells the land, reserving the trees. *Kingsley v. Holbrook*, 173.

See STATUTE OF FRAUDS, 5.

GUARANTY.

1. **NOT CONTINUING GUARANTY.** — A continuing guaranty is not given by a letter which says: "If you will let the bearer have what leather he wants, and charge the same to himself, I will see that you will have your pay in a reasonable length of time." Its operation is limited to a single purchase or transaction. *Gard v. Stevens*, 52.
2. **APPLICATION OF PAYMENTS.** — Where a merchant sells goods to a customer under a guaranty from a third person that they will be paid for, and afterwards sells him other goods, the first money he receives from the purchaser should be applied to the payment of the goods covered by the guaranty. *Id.*
3. **CONTINUING GUARANTY — PRESUMPTIONS, AS TO.** — Unless one becomes surety for another, without limitation as to time or amount, in express terms or by clear implication, the court will not presume such an intention on his part. *Id.*

HIGHWAYS.

1. **PRESUMPTION IS THAT OWNERS OF LAND** on each side of the street own to the middle of the street and have exclusive right to the soil, subject to the right of way. *Hinchman v. Paterson Horse R. R. Co.*, 252.
2. **INFERENCE OF LAW IS THAT CONVEYANCE OF LAND** bounded on a public highway carries with it the fee to the center of the road as part and parcel of the grant. *Id.*
3. **BUILDING AND OPERATION OF HORSE-RAILROAD** in the streets of a city by authority of the legislature and the city council, under limitations and restrictions contained in the city charter, is a legitimate use of the highway and an exercise of the public right of travel, and not a taking of private property for a public use, within the provision of the constitution. *Id.*

See EMINENT DOMAIN; NEGLIGENCE; NUISANCE, 2; RAILROADS, 6-8.

HOMESTEADS.

1. **STATUTORY VALUE OF HOMESTEAD IS EXEMPT FROM ATTACHMENT** where, having been actually invested in land as a homestead, it is changed into money, or a right of action by process of law *in invitum*, and then kept separate as a homestead fund, and no intent is shown to apply it to other uses. *Keyes v. Rince*, 707.

2. PROCEEDS OF SALE OF HOMESTEAD BELONG TO WIFE, AND CANNOT BE ATTACHED for her husband's debts, where she refuses to join in a deed of the homestead unless the avails are given to her, and the husband consents to her having them. *Id.*
3. WIFE WHO HAS VOLUNTARILY LEFT FORMER HOMESTEAD, and accompanied the husband to and accepted the new homestead provided by him, can no longer insist that her homestead rights still attach to and control the abandoned premises, or resist the enforcement of a contract by the husband to convey the former homestead, made while it was occupied as such. *Allison v. Shilling*, 622.

See SPECIFIC PERFORMANCE, 3.

HOMICIDE.

See CRIMINAL LAW, 14-19.

HUSBAND AND WIFE.

1. HUSBAND HAS RIGHT TO CORRECT WIFE, is required to govern his household, and for that purpose may use toward his wife such degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury is inflicted, or there is an excess of violence, or such degree of cruelty inflicted as shows a desire by the husband to gratify his own bad passions, the law will not invade the domestic forum, nor inflict punishment upon him. *State v. Black*, 436.
2. ACQUISITIONS OF EITHER JOINT OR SEPARATE LABOR of husband or wife become community property. *Cooke v. Bremond*, 626.
3. ALL PROPERTY ACQUIRED BY PURCHASE OR APPARENT ONEBOUS TITLE is *prima facie* community property, whether the conveyance be in the name of the husband or of the wife, or in the names of both. *Id.*
4. LAND CONVEYED TO HUSBAND OR WIFE OR BOTH BY DEED OF PURCHASE is presumed to be community property, and parol evidence is not admissible to explain or modify such deeds so as to ingraft upon the property after it has passed to innocent purchasers a trust to their detriment; though as between the parties to such deeds, their privies in blood, or purchasers without value or with notice, their legal import may be affected by parol evidence. *Id.*
5. INSPECTION OF DEED TO MARRIED WOMAN WHICH EXPRESSES VALUABLE CONSIDERATION on its face authorizes the inference that the land is community property, and subject to the disposal of the husband alone. *Id.*
6. FACT THAT CONVEYANCE EXPRESSING VALUABLE CONSIDERATION WAS TAKEN IN NAME OF WIFE imposes no burden upon the purchaser from the husband of inquiring as to the equities of the husband and wife in respect to the property. *Id.*
7. GENERAL PRINCIPLE THAT FOR FRAUD OR OTHER TORT OF MARRIED WOMAN ACTION MAY BE MAINTAINED against her and her husband is applicable only to actions brought for wrongs done by her that are torts pure and simple, that is, torts the substantive basis of which is not her contract. *Keen v. Hartman and Wife*, 606.
8. ACTION WILL NOT LIE AGAINST HUSBAND AND WIFE FOR HER FALSE AND FRAUDULENT REPRESENTATIONS that she was a widow at the time she executed to the plaintiff a bond and mortgage, in exchange for which he gave to her promissory notes to a large amount against a third person. *Id.*

9. WHERE PLAINTIFF'S INJURY CONSISTS IN HIS INABILITY TO REALIZE what a *feme covert* gave him reason to expect from her undertaking, it is not a case of pure and simple tort. *Id.*
10. HUSBAND AND WIFE, FOR PURPOSE OF GIVING AND RECEIVING POWER either to and from each other or third persons, are to be considered as if no relation of marriage existed between them. *Weisbrod v. Chicago etc. Railway Co.*, 743.
11. HUSBAND MAY ACT AS AGENT OF HIS WIFE in transactions relating to her separate estate, and may execute in her name a conveyance of her land under a power of attorney. *Id.*

See HOMESTEADS; MARRIED WOMEN.

INFANCY.

See NEGLIGENCE, 9; RAILROADS, 7.

INJUNCTIONS.

WHERE COMPLAINANT'S RIGHT IS DOUBTFUL, and no irreparable injury will be inflicted by the subject-matter complained of, it is not a proper case for an injunction. *Hinchman v. Paterson Horse R. R. Co.*, 252.

See NUISANCE, 3.

INNKEEPERS.

INNKEEPER IS NOT LIABLE FOR LOSS OF GOODS OF GUEST, if loss is occasioned by the want of that ordinary care on the part of the guest which a prudent man may be reasonably expected to take under all the circumstances of the case; and whether or not the guest has exercised such ordinary care is always a question of fact for the jury. *Hadley v. Upshaw*, 654.

INSANITY.

1. IT IS PRESUMED THAT PERSON INDICTED FOR CRIME IS SANE, and the burden is upon him to rebut the presumption by proof that will satisfy the jury that he was at the time incapable of distinguishing between right and wrong. *State v. McCoy*, 121.
2. PREPONDERANCE OF EVIDENCE IN FAVOR OF INSANITY OF PRISONER will authorize an acquittal; a mere doubt of his sanity is not sufficient. *Id.*

See CONTRACTS, 5.

INTEREST.

1. LOAN TO CORPORATION, PAYABLE AT FIXED TIME AND PLACE, DOES NOT BEAR INTEREST after the time so fixed for payment, whether the bond or evidence of indebtedness be presented or not; and it is not necessary, to escape after-accruing interest, that the amount of the loan, with accumulated interest at the time of payment, be kept separate from the other funds of the company, if it can be shown that funds sufficient for payment were at all times in hand. *Emlen v. Lehigh Coal and Navigation Co.*, 518.
2. INTEREST MAY BE RECOVERED BY WAY OF DAMAGES ON OVERDUE COUPONS from the time of demand and refusal of payment. *Whitaker v. Hartford etc. R. R. Co.*, 614.

INSTRUCTIONS.

See PLEADING AND PRACTICE.

INSURANCE.

1. THAT INSURANCE POLICY IS VOID BECAUSE ISSUED CONTRARY TO LAW IS PROPER MATTER OF DEFENSE. *Fitzsimmons v. City Fire Ins. Co.*, 761.
2. PRESUMPTION IS THAT FOREIGN INSURANCE COMPANIES HAVE COMPLIED WITH LAWS of the state in which they have effected insurance. *Id.*
3. COMPLAINT ON FIRE POLICY ISSUED BY FOREIGN INSURANCE COMPANY NEED CONTAIN NO ALLEGATION that the defendant has complied with the statute requiring such companies to file certain statements under oath with the secretary of state, and obtain his certificate of authority to transact business, etc. *Id.*
4. STATEMENT MADE BY INSURED IN SURVEY IS WARRANTY, when the policy refers to and makes the survey a part of the policy; and the fact that the statement is promissory rather than affirmative does not alter the rights and duties of the parties, for if the promise is not kept, the insurer is not bound by the policy. *Ripley v. Aetna Ins. Co.*, 302.
5. INTENTION OF PARTIES MUST BE GIVEN EFFECT IN CONSTRUING CONTRACTS OF INSURANCE as in the construction of all other contracts. *Id.*
6. ANSWER BY INSURED TO QUESTION IN SURVEY, whether there was a watchman in the building during the night, that "there is a watchman nights," must be understood to mean that there was a watchman in the building every night; and the warranty is broken, and the policy annulled, if no watch was kept from twelve o'clock Saturday night till twelve o'clock Sunday night. *Id.*
7. EVIDENCE OF CUSTOM OF FACTORIES IN VICINITY OF ONE INSURED not to keep a watch from twelve o'clock Saturday night till twelve o'clock Sunday night should not be permitted to control the language of the contract of insurance, which must be understood to mean that there was a watchman in the factory every night. *Id.*
8. PAROL EVIDENCE CANNOT BE RECEIVED TO CONTROL OR MODIFY WARRANTY in a policy of insurance; and therefore evidence to show that the agent of the insurer was informed that a watchman was not kept in the insured building from twelve o'clock Saturday night till twelve o'clock Sunday night is inadmissible to control a warranty, that a watchman was in the building every night. *Id.*
9. BREACH OF WARRANTY ANNULS POLICY, without regard to the materiality of the warranty, or whether the breach had anything to do in producing the loss. *Id.*
10. CONDITION IN POLICY OF INSURANCE THAT NO ACTION SHALL BE BROUGHT FOR RECOVERY OF ANY CLAIM UPON IT, unless the action shall be commenced within one year after the loss or damage, is valid and binding. *Id.*
11. WAIVER OF CONDITION TO BE OPERATIVE must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition. *Id.*
12. CONDITION AS TO BRINGING ACTION ON POLICY OF INSURANCE WITHIN CERTAIN TIME IS NOT WAIVED by the insurance company, on being applied to for the payment of the loss, declining to enter into any negotiation concerning the claim while certain suits in which the company had been garnished were pending. *Id.*

- 13. INSURANCE COMPANY IS BOUND TO PAY ITS RATABLE SHARE OF LOSS, AND CAN DERIVE NO BENEFIT FROM EXCESS OF PAYMENT MADE BY ANOTHER COMPANY.** Where property is insured in several fire insurance companies, and each policy contains a clause that in case of loss the assured shall not be entitled to receive of the company issuing such policy any greater proportion of the loss than the amount insured by such policy bears to the whole amount insured upon the property, the companies are all and each liable to pay the ratable portion mentioned in the clause, though it might happen that some had paid more than their share, and even enough to cover the whole loss or damage sustained by the assured. *Fittsimmons v. City Fire Ins. Co.*, 761.
- 14. SAME — NO CONTRIBUTION UNDER SUCH CLAUSE.** — If one of the companies pays more than its ratable share of loss under such a clause, it cannot claim contribution from others which have not paid their share, but must enforce its remedy, if it have any, against the assured. *Id.*
- 15. INSURER OF VESSEL IS NOT LIABLE FOR LOSS BY CAPTURE BY PRIVATEER** under a policy in which the perils insured against include piracy, but in which liability for "loss by seizure, capture, or detention, or the consequences of an attempt thereat," are excepted. *Fifield v. Pennsylvania State Ins. Co.*, 523.
- 16. LOSS OF GOODS JETTISONED ON VOYAGE IS COVERED BY MARINE POLICY** specifying the goods, and made with reference to a particular trade or line of steamers, the goods being on deck for carriage, in accordance with an established usage of such trade or line. *Merchants' and Manufacturers' Ins. Co. v. Skillito*, 491.

See CORPORATIONS, 8-11.

JUDGMENTS.

- 1. ORDERS OR JUDGMENTS OF PROBATE COURT, MADE OR RENDERED IN PROGRESS OF RIGHTFUL ADMINISTRATION,** concerning matters upon which the court has the right to deliberate and decide, cannot be collaterally impeached, because, however erroneous they may be, they are not void. *Withers v. Patterson*, 643.
- 2. ORDERS OR JUDGMENTS WHICH COURT HAS NO POWER UNDER ANY CIRCUMSTANCES TO MAKE OR RENDER** are, of course, null, and their nullity may be asserted in any collateral proceeding where they are relied on in support of a claim of right. *Id.*
- 3. JUDGMENT AGAINST CORPORATION FOR DAMAGES FOR LOSS OF STEAMBOAT** through the negligence of its agents is not a debt of the corporation for which the directors are personally liable under the statute providing that in case of any excess of the amount of the debts of a corporation over the amount of its capital stock actually paid in, the directors shall be jointly and severally liable to the extent of such excess. *Cable v. Gaty*, 126.
- 4. PAROL PROOF OF PAYMENT OF JUDGMENT.** — At common law, in an action upon a record, the defendant could not plead payment, because such payment was matter *in pais*, and not of record. A defendant may settle a judgment debt with plaintiff upon such terms as they may agree to, and as between themselves this arrangement will be perfectly valid, but they cannot thus wipe out a record to the prejudice of other parties. *Nichols v. Diseler*, 219.

5. REVERSAL OF JUDGMENT ENTITLES APPELLANT TO BE RESTORED to all that he has lost by the judgment. *Carson's Adm'r v. Suggett's Adm'r*, 112.
6. PLAINTIFF WHO, AFTER REVERSAL OF JUDGMENT IN HIS FAVOR, VOLUNTARILY DISMISSES HIS SUIT, cannot set up his original claim to the property in defense of an action by the defendant to be restored to what he has lost by the judgment. *Id.*
7. COMPROMISE BY DEFENDANT OF JUDGMENT AGAINST HIM MUST BE PLEADED by plaintiff in bar of the prosecution of a writ of error by the defendant, and cannot be set up in defense of an action by the defendant, after reversal of the judgment, to be restored to what he has lost thereunder. *Id.*
8. JUDGMENT RESTORING DEFENDANT TO WHAT HE HAS LOST UNDER REVERSED JUDGMENT does not affect plaintiff's right to the property, or bar him from prosecuting his original claim, the effect of such judgment being merely to restore the parties to their *status* before the rendition of the original judgment. *Id.*
9. JUDGMENT OF SUPERIOR COURT OF ONE STATE, WHEN ACTION IS BROUGHT UPON IT IN ANOTHER STATE, will be in all respects of the same effect as a judgment of a court in the state where the action was brought. *Barnes v. Gibbs*, 210.
10. ORIGINAL CAUSE OF ACTION IS MERGED IN JUDGMENT in an action brought upon it. The effect of a judgment at common law is practically to destroy, so long as it exists, the ground upon which it rests. *Id.*
11. JUDGMENT IN ANOTHER STATE BARS SECOND ACTION UPON SAME CLAIM IN THIS STATE. Consequently, where plaintiff sued defendants in New York to recover a sum due him from them, and afterwards commenced another suit in New Jersey to recover upon the same claim, pending which latter suit a judgment was rendered in his favor in the New York court, this judgment bars his action in the New Jersey court. *Id.*
12. AMENDMENT NOT ALLOWED. — Where plaintiff had two actions pending for the same debt, one in New York and one in New Jersey, and pending the latter suit a judgment in his favor is rendered in the New York suit, he will not be allowed to amend his pleadings from *assumpsit* on the claim to debt on the judgment. *Id.*
13. IT IS NOT GOOD GROUND FOR CONTINUANCE OF SUIT ON FOREIGN JUDGMENT that execution has been issued thereon and levied on lands of the defendant in the foreign jurisdiction, and that the lands have been advertised for sale, as this shows no present defense to the action. *Field v. Sanderson*, 124.
14. DEFENDANT IN ACTION ON JUDGMENT CANNOT, UNDER AVERMENT THAT JUDGMENT WAS PROCURED BY FRAUD, reopen the issues determined by that judgment, and introduce evidence to impeach that given at the trial. The judgment is conclusive as to matters in issue. *Id.*
15. FACT THAT DEFENDANT APPEARED BY ATTORNEY, AS SHOWN BY JUDGMENT RECORD, cannot be traversed or denied by him; nor will he be permitted to show that such attorney had no authority to so appear, and the judgment will effectually conclude him. *Hubbard v. Dubois*, 690.
16. APPEARANCE FOR THOSE DEFENDANTS ONLY UPON WHOM SERVICE HAD BEEN MADE is shown by a judgment record from which it appears that the writ issued against four, but was served on two only, and proceeding as follows: "And at the same term come the said defendants, by their attorney," naming him, and then continuing to state the proceedings to a final judgment against the defendants. *Id.*

17. COPIES OF AUDITOR'S REPORT, AND OF RULE, CITATION, AND OFFICER'S RETURN THEREON, are admissible in evidence in an action upon a judgment rendered upon the report of an auditor, as aiding to explain the meaning of the record when doubtful, but not to contradict the record. *Id.*
 18. JUDGMENT AGAINST NON-RESIDENT DEFENDANT having property in the state, the summons having been served by publication, is conclusive upon the question whether the defendant had property in the state to give the court jurisdiction, except in a direct proceeding in the action itself, for relief; it cannot be collaterally attacked therefor. *Stone v. Meyers*, 104.
 19. SURETY FOR STAY OF EXECUTION IN JUDGMENT FOR ARREARS OF GROUND-RENT, who, after the expiration of the stay and judgment upon his recognizance of bail, pays the debt, interest, and costs, and obtains an assignment of the original judgment from the plaintiff's attorney, is not thereby entitled to priority over a judgment afterwards obtained by the same plaintiff for arrears of rent subsequently accrued. *Fassitt v. Middleton*, 535.
 20. DECREE ORDERING SHERIFF TO PLACE PURCHASER AT JUDICIAL SALE IN POSSESSION of the land purchased can have no effect upon the rights of any person who was not a party to the decree, and does not authorize the sheriff to turn such a person out of possession by virtue of the writ of possession. *Laird v. Winters*, 620.
- See ATTORNEY AND CLIENT, 1-3; JURISDICTION, 8, 9; PLEADING AND PRACTICE, 21, 22.

JURISDICTION.

1. JURISDICTION MAY BE ESTABLISHED, *prima facie*, by recitals in the record. *Potter v. Merchants' Bank*, 273.
2. OFFICER IS NOT TO BE HELD TRESPASSER UNLESS HE KNOWS OR HAS REASON TO KNOW THAT HE IS ACTING WITHOUT JURISDICTION. Thus the commissioner of highways or trustees of a village should be held not liable when they are required to act upon evidence which they know nothing about. *Porter v. Purdy*, 283.
3. ASSESSMENTS, ATTACKS ON, FOR WANT OF JURISDICTION. — Assessments ordered by town trustees to defray the expense of building a sewer may be assailed in a direct proceeding to review or reverse the same for want of jurisdiction of the assessors appointed to assess the expense, arising from the fact that one of them was not a freeholder; but the assessment is not assailable on that ground in an action against the trustees, nor in other collateral proceedings. *Id.*
4. ACTS IN NATURE OF ADJUDICATIONS, WHICH, IF ERRONEOUS, MUST BE CORRECTED BY DIRECT PROCEEDINGS. — When in special proceedings in courts or before officers of limited jurisdiction, they are required to ascertain a particular fact, or to appoint persons to act in such proceedings, having particular qualifications, or occupying some peculiar relation to the parties or the subject-matter, such acts when done are in the nature of adjudications, which, if erroneous, must be corrected by a direct proceeding for that purpose; and if not so corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be. *Id.*
5. JURISDICTION OF COURT MEANS POWER OR AUTHORITY WHICH IS CONFERRED UPON IT by the constitution and laws to hear and determine

causes between parties and to carry its judgments into effect. *Withers v. Patterson*, 643.

6. **POWERS OF COUNTY COURTS IN RESPECT TO ESTATES OF DECEDENTS** are all conferred by statute, and whatever the statute authorizes these courts to do they may rightfully do. *Id.*
7. **JURISDICTION OVER NON-RESIDENT ON SERVICE BY PUBLICATION** results from the fact that he has property within the jurisdiction, and extends only to such property as was within the state when the jurisdiction attached. *Stone v. Meyers*, 104.
8. **COURT OF GENERAL JURISDICTION IS PRESUMED IN ABSENCE OF PROOF TO HAVE ACTED** within limits of its authority in doing a thing which it has the power under certain circumstances to do, such circumstances being presumed to have existed; but this presumption is indulged only in the absence of proof, and not against proof. *Withers v. Patterson*, 643.
9. **COURT EXERCISES ITS JURISDICTION ONLY WHEN FACTS EXIST** which authorize it to act; and it is not universally true that if a court determines any question of fact necessary to support its jurisdiction its determination or judgment can never be collaterally impeached. *Id.*

See CORPORATIONS, 4; JUDGMENTS.

JURY AND JURORS.

IMPROPER INTERFERENCE WITH JURY. — Where it appears that defendant and his sons took up their quarters in different houses of entertainment frequented by the jury, that they paid them unusual civilities and attentions, that they treated them more than once, and where this was done under such circumstances as to render it probable that it was done for the purpose of influencing the jury, a new trial will be granted. *Phillipsburgh Bank v. Fulmer*, 193.

See CRIMINAL LAW, 4; ESTOPPEL, 6; NEGLIGENCE, 10, 11.

LANDLORD AND TENANT.

1. **ASSIGNMENT, AND NOT UNDERLETTING, WILL BE PRESUMED**, if any presumption is to be indulged in, in the absence of proof to the contrary, where an underletting without the written consent of the lessor is made a ground of forfeiture of the term, and parties other than the lessees are in possession without such consent. *Bedford v. Terhune*, 394.
2. **UNDERLETTING MUST BE OF PART ONLY OF UNEXPIRED TERM.** When the transfer is of the whole of a term, the person taking is an assignee, and not an under-tenant, although there is in form an underletting. *Id.*
3. **ASSIGNMENT, AND NOT UNDERLETTING, WILL BE PRESUMED**, in the absence of any evidence of the agreement under which parties entered into the possession of demised premises subsequent to the lessees, if it is shown that they occupied the whole of the unexpired term. *Id.*
4. **ASSIGNMENT WILL BE PRESUMED** where parties entered by the consent of the lessees, had the lease in their hands, and paid the rent thereon to the lessor for the benefit of the lessees, and occupied for the whole residue of the term, and there is no evidence of a holding in any other character than as assignees. *Id.*
5. **ASSIGNMENT OF LEASE WILL BE INFERRED TO BE VALID AND OPERATIVE**, where the law infers an assignment from certain facts proved; and it is incumbent on parties sought to be charged as assignees for the payment of rent to prove, either that there was no assignment, or that the assignment was void in law. *Id.*

6. **ASSIGNEES ARE LIABLE ON LEASE FOR RENT**, and not in an action for use and occupation. *Id.*
7. **AMENDMENT MAY BE MADE SO AS TO CONFORM COMPLAINT FOR USE AND OCCUPATION TO PROOF** that the defendants were liable on a lease for rent as assignees, the defendants not being surprised. *Id.*
8. **SURRENDER OF LEASE MUST BE PROVED BY PLAINTIFF**, so that he was at liberty to relet the premises, where, in an action for use and occupation, a lease from the plaintiff to other parties, which had two years to run from the entry of the defendants, is proved; and if a surrender in law is proved, the defendants are liable for the rent. *Id.*
9. **SURRENDER OF LEASE REQUIRES MUTUAL AGREEMENT BETWEEN LESSOR AND ORIGINAL LESSEE** that the lease shall terminate; but it is not necessary that the agreement should be express; it may be inferred from the conduct of the parties. *Id.*
10. **OCCUPANCY BY SOME PERSON OTHER THAN LESSEE IS CIRCUMSTANCE SHOWING SURRENDER**; but as the new occupant may enter as the tenant of the lessee, or as his assignee, or even as a trespasser, and thus his occupancy be consistent with the continuance of the first lease, it is absolutely essential that it should be clearly proved that the original lessee assented to the termination of his term. *Id.*
11. **TENANTS ARE LIABLE, AS ASSIGNEES, FOR RENT ACCRUING AFTER THEIR ENTRY**, where they insist that they entered under the lessees, show the lease in their hands, and prove payment of rent by them on the lease for the benefit of the lessees. *Id.*
12. **PAROL LEASE FOR YEARS AT RENT PAYABLE MONTHLY FOLLOWED BY OCCUPANCY** and payment of rent creates tenancy from year to year; and the monthly payment of rent will not constitute it a tenancy from month to month so as to authorize the tenant to terminate the lease at the end of any month without notice; nor will the breach of a promise to give a written lease alter the relations of the parties in respect to the nature of the tenancy. *Scully v. Murray*, 116.
13. **LESSEE WHO MAKES PERMANENT IMPROVEMENTS** upon the demised premises, under a covenant that he shall be repaid their appraised value at the expiration of the term, may seek relief in equity as well as at law. The value of the improvements constitutes an equitable lien upon the premises, which alone entitles the party to relief in equity. *Conover v. Smith*, 247.
14. **WHERE LESSEE COVENANTS FOR HIMSELF AND HIS ASSIGNS** to make a new wall upon a part of the thing demised, it shall bind the assignee. But if the thing to be done is collateral to the land, and does not touch or concern the thing demised, then the assignee is not charged, though named in the covenant. The covenant is merely personal, and does not affect the land demised. *Id.*
15. **WHERE LESSOR COVENANTS WITH LESSEE**, without mentioning his assigns, to pay the value of machinery and fixtures at the end of the term, which machinery and fixtures are authorized to be substituted for those upon the premises at the time of the demise, such covenant inures to the benefit of the assignee of the tenant, though he is not expressly named in the lease. But as such improvements constitute an equitable lien upon the premises, it can only be enforced in a court of equity. *Id.*
16. **ATTORNMEN TO STRANGER**. — Tenant in possession under a lease from one person cannot accept a lease from a third person, and thereafter claim to hold under him. It is incompetent for a tenant, without the

- consent of his landlord, to change the nature of his tenancy by acknowledging a third person as his landlord. *Blanchard v. Tyler*, 57.
17. SUFFICIENT POSSESSION TO MAINTAIN ACTION TO QUIET TITLE. — Where a tenant in possession, with the consent of his landlord, attorns to two persons who have no interest in the land, and one of whom afterwards, as agent for the complainant, leased the whole lot to the tenant, this lease estops the person signing it as complainant's agent from asserting any claim against the latter, and the tenant being in possession under this lease, ostensibly of the whole tract, and rightfully of at least half of it, gives such possession to the complainant as entitles him to bring an action under the statute to quiet his title to the land. *Id.*
 18. NOTICE TO QUIT BY ONE ASSUMING TO ACT AS AGENT OF ANOTHER, BUT HAVING NO AUTHORITY, CANNOT BE RATIFIED after the time when the notice is to operate, so as to lay the foundation for summary proceedings under the landlord-and-tenant act. *Pickard v. Perley*, 153.
 19. NOTICE TO QUIT BY TWO OF THREE JOINT LESSORS WILL NOT TERMINATE TENANCY AS TO ALL, so as to enable the three lessors to maintain summary proceedings under the landlord-and-tenant act. *Id.*

LARCENY.

See CRIMINAL LAW, 11-13.

LATERAL SUPPORT.

See EASEMENTS, 2, 3.

LIBEL.

1. ACTION FOR LIBEL WILL LIE AGAINST CORPORATION AGGREGATE. *Aldrich v. Press Printing Co.*, 84.
2. LIBELOUS MATTER PUBLISHED AGAINST CANDIDATE FOR PUBLIC OFFICE, whether by an individual or a public journal, is not a privileged communication, and will render the person making the publication equally liable for his acts with those who commit the same offense against private individuals. *Id.*
3. WHAT ARE PRIVILEGED COMMUNICATIONS, stated. *Id.*

LOST PROPERTY.

FINDER OF NEGOTIABLE PAPER, OR THIEF WHO STEALS IT, ACQUIRES NO TITLE, although either may transfer a good title to a *bona fide* purchaser, and the same rule probably applies to the case of one obtaining such paper through any positive breach of the law. *City Bank of New Haven v. Perkins*, 322.

LUNACY.

See CONTRACTS, 5.

MALICIOUS PROSECUTION.

1. WHERE PLAINTIFF WHOSE JUDGMENT HAS BEEN PARTIALLY SATISFIED CAUSES EXECUTION TO ISSUE in a sum greater than the balance due thereon, and there is no proof that the wrongful act was willful or was done through malice, he will not be liable to an action on account thereof. *Hall v. Leaming*, 213.
2. CIVIL ACTION IS PROSECUTED ONLY AT PERIL OF COSTS. It is maintained as a claim of right, and to convert it into a suable tort, it must clearly

appear that the legal process has been used from malice and without probable cause. *Id.*

3. IN ACTION ON CASE FOR MALICIOUS PROSECUTION, evidence that a criminal prosecution was commenced for the purpose of obtaining possession and ownership of personal property alleged to have been stolen is proof of want of probable cause, and consequently of malice. *Shofield v. Ferrera*, 532.
4. IN ACTION FOR MALICIOUS PROSECUTION, WANT OF PROBABLE CAUSE IS EVIDENCE OF MALICE ONLY, and must therefore be referred to the jury for decision as to the existence of malice; and an instruction to the jury that if there was not probable cause the plaintiff should recover is error. *Id.*
5. IN ACTION FOR MALICIOUS PROSECUTION in having commenced and maintained a criminal prosecution for the alleged theft of certain property, the record of a replevin suit, brought subsequently to the criminal prosecution for the same property, is not admissible to show a former recovery, nor in mitigation of damages. *Id.*

MARITIME LAW.

1. DISTINCTION BETWEEN PRIVATEERING AND PIRACY is the distinction between captures *jure belli* under color of governmental authority, and for the benefit of a political power organized as a government *de jure* or *de facto*, and mere robbery on the high seas committed from motives of personal gain, like theft or robbery on land. In the one instance the acts committed inure to the benefit of the commissioning power; in the other, to the benefit of the perpetrators merely. *Fifield v. Pennsylvania State Ins. Co.*, 523.
2. CAPTURE BY PRIVATEER IN COMMISSION UNDER SO-CALLED GOVERNMENT OF CONFEDERATE STATES was held not to be piracy, for the reason that the President of the United States recognized such government, and the vessel as a privateer thereof, by exchanging the crew of such vessel, which had been subsequently captured, as prisoners of war. *Id.*

See SHIPPING.

MARRIED WOMEN.

1. AT COMMON LAW WIFE COULD NOT APPOINT ANOTHER TO ACT IN HER STEAD, for she was incapable of acting for herself. *Weisbrod v. Chicago etc. Railway Co.*, 743.
2. AT COMMON LAW FEME COVERT MIGHT BE ATTORNEY OF ANOTHER to make livery to her husband upon a feoffment; and a husband might make such livery to his wife. *Id.*
3. WIFE MAY ACT AS AGENT OR ATTORNEY OF HER HUSBAND, and as such, with his consent, bind him by her contract or other act. *Id.*
4. WIFE MAY ACT AS AGENT OF ANOTHER in a contract with her own husband. *Id.*
5. AT COMMON LAW WIFE COULD CONVEY TO OTHERS AS HER HUSBAND'S agent, though she could not take by grant or gift from him. This distinction arose from the inherent difference between a mere power to convey and the conveyance itself. *Id.*

See HUSBAND AND WIFE.

MAXIMS.

FAMILIAR MAXIM, QUI SENTIT COMMODOUM SENTIRE DEBET ET ONUS, APPLIES TO THIS CASE. *Pfeifer v. Sheboygan etc. R. R. Co.*, 751.

MORTGAGES.

1. **LEGAL OWNER OF LANDS SUBJECT TO MORTGAGE MAY MAINTAIN ACTION TO COMPEL DISCHARGE OF MORTGAGE**, if it be fully paid, or to redeem the land from its lien if it be not paid. *Beach v. Cook*, 260.
2. **OFFER TO PAY ANY BALANCE DUE** is not indispensable in an action to redeem from a mortgage. *Id.*
3. **MORTGAGOR WHO HAS CONVEYED MORTGAGED PREMISES IS COMPETENT WITNESS FOR HIS GRANTEE**, to show payment of the mortgage, in an action by the latter to procure its discharge, or leave to redeem. *Id.*

See RAILROADS, 9.

MURDER.

See CRIMINAL LAW, 14-19.

NEGLIGENCE.

1. **LIABILITY FOR PERSONAL INJURY OCCASIONED BY NEGLIGENCE OF SEVERAL PERSONS IS SEPARATE AS WELL AS JOINT.** *Creed v. Hartmann*, 341.
2. **BOTH OR EITHER OF TORT-FEASORS MAY BE SUED BY INJURED PARTY**, at his election. *Id.*
3. **TORT-FEASORS NEED NOT ALL BE JOINED** in action for injury. Their liability is separate as well as joint. *Id.*
4. **COMPLAINT SHOULD NOT BE DISMISSED AND NONSUIT GRANTED FOR CONTRIBUTORY NEGLIGENCE**, unless the undisputed facts clearly show that which the law adjudges negligence. *Id.*
5. **PERSONS WHO, WITHOUT SPECIAL AUTHORITY, MAKE OR CONTINUE COVERED EXCAVATION IN PUBLIC STREET or highway, for private purpose**, should be responsible for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use, there being no negligence by the parties injured. And it is immaterial whether the excavation was a covered or an open one, where it was made without authority, and the party injured was free from fault. *Id.*
6. **CONTRACTORS ARE LIABLE FOR NEGLIGENCE OF SUBCONTRACTORS, WHEN.** — Persons contracting with owner of lots to build block of houses thereon, and who sublet to one who agrees to make excavations, blast rocks, etc., and to make good all damages, are liable for an injury caused to an individual by his falling into an excavation in the sidewalk, through the negligence of the subcontractor, or his servants, in not having the same properly protected, where the original contractors have no authority from the city to make such excavation. *Id.*
7. **CONTRACTOR HAVING UNAUTHORIZED EXCAVATION MADE IN STREET IS LIABLE** for an injury occasioned thereby to a passer-by, whether it was caused by the negligence of workmen or not. *Id.*
8. **BASIS OF CONTRACTOR'S LIABILITY**, where he has procured an excavation to be made in a street or highway, without authority, is his own wrongful act in so doing, and not the negligence of the subcontractor, or his workman, in performing or guarding the work. *Per Selden, J.* *Id.*

9. CHILD OF TENDER YEARS IS HELD ONLY TO EXERCISE OF THAT DEGREE OF CARE and discretion to be ordinarily expected from children of that age; the rule of law as to mutual negligence applicable between adult parties does not apply to the case of such a child. *Smith v. O'Connor*, 582.
10. NEGLIGENCE IS QUESTION FOR JURY EXCLUSIVELY TO DETERMINE. *Id.*
11. NO ABSOLUTE RULE AS TO WHAT CONSTITUTES NEGLIGENCE can be laid down; for conduct which might be termed negligent in one case would in another be held to constitute ordinary care; and it is therefore always a question of fact for the jury, under direction of the court, as to the relative degree of care or the want of it, growing out of the circumstances and conduct of the parties. *Philadelphia etc. R. R. Co. v. Spearen*, 544.
12. PLAINTIFF, IN ACTION FOR INJURY SUSTAINED BY ANOTHER'S NEGLIGENCE, IS ONLY REQUIRED to establish a *prima facie* case that the injury was occasioned by defendant's negligence. *Achtenhagen v. City of Watertown*, 769.
13. PLAINTIFF IN ACTION FOR INJURY SUSTAINED BY ANOTHER'S NEGLIGENCE IS NOT BOUND, in the first instance, to show that he himself was not guilty of contributory negligence. *Id.*
14. WHERE PLAINTIFF'S OWN EVIDENCE IN ACTION FOR INJURY SUSTAINED BY ANOTHER'S NEGLIGENCE raises an inference of negligence against himself, he must, in order to establish a *prima facie* case, show that he was guilty of no negligence. *Id.*
15. PRESUMPTION OF CONTRIBUTORY NEGLIGENCE MUST BE NEGATIVED TO AVOID NONSUIT, WHEN. — Presumption of negligence on part of deceased is raised in an action against a municipal corporation for damages arising from negligence in leaving a bridge unrepaired, in consequence of which the plaintiff's son fell through and was drowned, where it appears from the plaintiff's own evidence that the deceased was thirteen years old, that he was familiar with the bridge, that he knew of the hole in it, that the accident occurred in the daytime, and that he had passed over the bridge a short time before on the same day. The plaintiff is bound to negative this presumption, or he will be nonsuited. *Id.*

See COMMON CARRIERS; DAMAGES, 1-5; RAILROADS.

NEGOTIABLE INSTRUMENTS.

1. COMPLAINT AGAINST DRAWER, IN ACTION UPON BANK CHECK, MUST AVER presentment of the check at the bank, and notice of its dishonor given the drawer, or some fact excusing such presentment and notice. *Dolph v. Rice*, 778.
2. HOLDER OF BANK CHECK CANNOT RECOVER AGAINST DRAWER WITHOUT PROOF of presentment, dishonor, and notice. These facts, therefore, should be averred in the complaint. *Id.*
3. PLAINTIFF, IN ACTION ON BANK CHECK, CANNOT, UNDER ALLEGATION OF DEMAND AND NOTICE, PROVE circumstances dispensing with demand and notice. This he could do under the former rules of pleading, but it is otherwise under the code practice. *Id.*
4. CERTIFICATE OF DEPOSIT PAYABLE "IN CURRENT FUNDS" IS NOT NEGOTIABLE PAPER. *Lindsey v. McClelland*, 786.
5. CERTIFICATE OF DEPOSIT PAYABLE "IN MONEY" SEEMS TO POSSESS ALL REQUISITES OF NEGOTIABLE PROMISSORY NOTE, and as between the indorser and indorsee the latter is held only to reasonable diligence in presenting it for payment. *Id.*

6. IN REASON PARTIES TO NEGOTIABLE CERTIFICATE OF DEPOSIT DO NOT CONTEMPLATE IMMEDIATE DEMAND OF PAYMENT; therefore an indorsee, as against the indorser, is not held to the same degree of diligence in presenting it for payment as the law requires in other cases. *Id.*
 7. IF PAYEE OF NOTE, AFTER IT FALLS DUE, SURRENDERS IT TO MAKER ON RECEIVING FROM HIM CERTIFICATE OF DEPOSIT, payable in current funds for a part of the amount due, and the remainder in cash, and upon presentation of the certificate at the bank five or six days afterwards, the bank refuses payment on account of having failed in the mean time, the payee may recover the amount against the maker of the note, unless it appears that he expressly agreed to take the certificate in payment of his debt. *Id.*
 8. RIGHT OF HOLDER OF PROMISSORY NOTE TO SUE THEREON. — A promissory note made for the purpose of raising money, or of being exchanged for money, though made payable to a particular person or corporation, and with the expectation that it will be discounted by the payee, may be discounted by any other person; and the party who advances the consideration may hold the note as a valid consideration for the money, even against sureties, and may use the name of the payee to enforce payment by suit, by the payee's consent, either express or implied. *Farmers' etc. Bank v. Humphrey*, 671.
 9. NOTHING SHORT OF ACTUAL MALA FIDES OR NOTION THEREOF WILL ENABLE MAKER OR INDORSER OF NEGOTIABLE PAPER TO DEFEAT ACTION THEREON brought by one who is apparently a regular indorsee or holder, especially where there is no defense as to the indebtedness. *City Bank of New Haven v. Perkins*, 332.
 10. DEFENDANT WHO OWES DEBT HAS NO INTEREST BEYOND BONA FIDES OF HOLDER. *Id.*
 11. TO ACTION ON BILLS OF EXCHANGE DRAWN OR ACCEPTED BY DEFENDANT, HE CANNOT INTERPOSE DEFENSE that the same were the property of a bank, and were transferred or pledged to the plaintiff as security for a loan by the cashier, who had no authority to so transfer or pledge them. *Id.*
 12. IT IS ENOUGH IN ACTION ON BILLS OF EXCHANGE THAT PLAINTIFF'S TITLE IS GOOD AS AGAINST DEFENDANT. If any others claim title to the bills superior to that of plaintiff, it can be determined whenever they come before the court to assert it. *Id.*
 13. PRIMA FACIE MEASURE OF DAMAGES IN ACTION FOR CONVERSION OF PROMISSORY NOTE is the amount which the maker of the note agreed to pay, and interest. But the defendant in such action may prove the insolvency of the maker, and thereby lessen the damages. *Potter v. Merchants' Bank*, 273.
 14. CESSATION OF MAILS AND COMMERCIAL INTERCOURSE BETWEEN PITTSBURGH AND NEW ORLEANS, while blockaded by the authority of the United States during the Rebellion, is a sufficient excuse for the omission to give due and regular notice of the dishonor of a bill of exchange drawn by a mercantile firm in the former city on one in the latter. And a recovery on such bill may be had if such notice was given within a reasonable time after the removal of the impediment. *House v. Adams & Co.*, 588.
- See ALTERATION OF INSTRUMENTS; BANKS AND BANKING; FRAUD, 2; LOST PROPERTY; USURY.

NEW TRIALS.

See PLEADING AND PRACTICE; REFERENCE.

NOTICE.

See BONA FIDE PURCHASERS; DEEDS, 2, 6; ELECTIONS.

NUISANCE.

1. PUBLIC NUISANCE MUST BE OCCASIONED BY ACTS done in violation of law. A work authorized by law cannot be a nuisance. *Hinchman v. Paterson Horse R. R. Co.*, 252.
2. WHETHER CONSTRUCTION OF RAILROAD IN CITY STREET would operate beneficially or injuriously to the public right of way, whether it would prove a public benefit or a public nuisance, are questions to be determined by the legislature and the city council. If they err in judgment, and the work prove an obstruction to the street and a public inconvenience and injury, it is not punishable as a nuisance if constructed as prescribed by the city charter. *Id.*
3. EQUITY WILL NOT INTERFERE BY INJUNCTION in cases of unquestioned public nuisance, except where there is special and serious injury to the complainant distinct from that suffered by the public at large. *Id.*

See PLEADING AND PRACTICE, 3.

PARTITION.

1. CO-DEVISEE IS NOT ESTOPPED IN EQUITY TO CLAIM DOWER AGAINST HER CO-PARTITIONERS, where, at the time of the partition of the estate between the co-devisees, she had an inchoate right of dower in premises partitioned to another, which subsequently to the partition became perfect by the death of her husband. In such case equity will decree contribution by all the co-partitioners, thus making good to the co-devisees, in whose share the dower is assigned, their equal share in the common estate remaining after the assignment of dower. *Walker v. Hall*, 482.
2. PROCEEDINGS IN PARTITION DO NOT DECIDE TITLE or create any new title; and parties to such proceedings, made such by publication, and without actual notice, are not thereby estopped from setting up their legal title. *McBain v. McBain*, 478.

PARTNERSHIP.

1. PERSONAL REPRESENTATIVE OF DECEASED PARTNER MAY CARRY ON BUSINESS for and bind his estate where the articles of copartnership contained a covenant to that effect. A covenant for the continuation of a partnership for a reasonable period after the death of one of the partners is binding on his estate, if assented to and carried out by his personal representatives. *Laughlin v. Lorenz's Adm'r*, 592.
2. WHERE ON DEATH OF PARTNER BUSINESS OF FIRM IS CLOSED BY CREATION OF NEW FIRM, composed of the surviving partner and the representatives of the deceased partner, the creditors of the new firm become clothed with those equities of that firm against the estate of the decedent, which arose out of the payment by the new firm of the debts of the old firm. *Id.*
3. WHERE LAND IS PURCHASED BY PARTNERSHIP, with partnership funds, and used for partnership purposes, upon dissolution of the firm by the death of one of the partners, his share of the land descends to his heir at

law as real estate, and does not pass to his representative as personalty, in the absence of any agreement in the articles of copartnership. *Summey v. Patton*, 451.

4. DOCTRINE OF ENGLISH EQUITY is that, as between partners and for the purposes of the firm, real estate belonging to the partnership will be treated as personalty if the partners have, by articles of copartnership or otherwise, impressed upon it that character. *Id.*
5. WHERE LAND IS PURCHASED BY PARTNERSHIP, with partnership funds, and used for partnership purposes, upon the death of one of the partners his wife is entitled to dower in his share, in the absence of partnership articles to the contrary: See *Summey v. Patton*, ante, p. 451. *Patton v. Patton*, 448.
6. INTEREST OF SPECIAL PARTNER IN LIMITED PARTNERSHIP cannot be levied upon and sold under an execution issued in an attachment suit brought against the members of the partnership. *Harris v. Murray*, 268.
7. SPECIAL PARTNER IS NOT DEPRIVED OF HIS INTEREST IN LIMITED PARTNERSHIP by a levy thereon under an attachment, nor is he thereby deprived of the right to an account, or prevented from collecting any surplus over such claims as the sheriff has upon it. *Id.*

PATENTS.

1. "USEFUL INVENTION," WITHIN MEANING OF PATENT ACT, is one that may be applied to some practical and statutory use named in the patent; but it is not necessary that it should be of such general utility as to supersede all other inventions used to accomplish the same purpose. *Rose v. Blanchard*, 783.
2. ASSIGNMENT OF RIGHT TO CONSTRUCT AND USE WORTHLESS PATENTED INVENTION constitutes no consideration for a promissory note. *Id.*
3. QUESTION AS TO WHETHER INVENTION IS USEFUL MUST BE LEFT TO JURY, under proper instructions, in an action upon a note, the consideration of which is the right to make and sell a patented invention. *Id.*
4. INSTRUCTION IMPROPERLY REFUSED. — IN ACTION UPON NOTE GIVEN FOR PATENT RIGHT, the defense to which is failure of consideration, it is error for the court to refuse to instruct the jury, at defendant's request, that if the article patented is "impracticable to be used for the purpose for which it was patented, then the defense of failure of consideration is established." *Id.*
5. INSTRUCTIONS IMPROPERLY GIVEN. — IN ACTION UPON NOTE GIVEN FOR PATENT RIGHT, it is error to instruct the jury, at plaintiff's request, "that if the invention patented is useful in some measure and for some purpose the patent is not void." It is too broad, and calculated to mislead the jury. So where the jury are told "that if the invention can be applied to any beneficial purpose, it may be deemed a useful invention," the charge is objectionable. *Id.*
6. EXPRESSION, "USEFUL FOR SOME BENEFICIAL PURPOSE," FOUND IN PATENT DECISIONS, IS TO BE TAKEN in a general sense as applicable to all patents, and not as implying in a particular case, where the thing invented is worthless for the purpose intended, but of possible useful application to some other, that the patent may nevertheless be valid. *Id.*

PERJURY.

See EVIDENCE, 3.

PLEADING AND PRACTICE

1. MOTION FOR CONTINUANCE OF CAUSE IS ADDRESSED TO DISCRETION OF COURT, and its decision will not be interfered with unless injury or injustice to the parties have plainly resulted from it. *Ayres v. Duprey*, 657.
2. ACTION DIES WITH PERSON AT COMMON LAW in case of an injury to the property or person of another for which damages only can be recovered. *Aldrich v. Howard*, 615.
3. ACTION ON CASE FOR ERECTING AND MAINTAINING STABLE so near hotel as to be nuisance thereto survives the death of the defendant pending the action, and may be prosecuted against his executor summoned to defend it, by virtue of a statute providing that causes of action and actions of trespass, and trespass on the case for damages to the person, or to real and personal estate, shall survive the death of the plaintiff or defendant therein. *Id.*
4. ANY EXPRESSION OF OPINION BY TRIAL JUDGE as to whether a fact in issue is or is not sufficiently proved is error, which error is not cured by announcing in his charge the jury's independency of him in all matters of fact pertaining to the issue. *State v. Dick*, 439.
5. EVIDENCE MUST CORRESPOND TO ALLEGATIONS AND BE CONFINED TO ISSUES, and if in the examination of witnesses facts come out which would furnish ground of relief or defense, such facts must be disregarded, unless they are warranted by allegations in the pleadings. *Finley v. Quirk*, 93.
6. ANSWER BY WAY OF DENIAL RAISES ISSUE ONLY ON FACTS ALLEGED IN COMPLAINT. *Id.*
7. PLEA WHICH PROFESSED IN ITS COMMENCEMENT TO ANSWER WHOLE CAUSE OF ACTION, and afterwards answered only a part, was bad under the old system of pleading as well as under the code. *Flemming v. City Fire Ins. Co.*, 761.
8. PARTIAL DEFENSE TO ACTION SHOULD BE SET UP AND RELIED ON AS SUCH, and not as a complete and entire defense. *Id.*
9. ANSWER WHICH PROFESSES AND ASSUMES TO ANSWER ENTIRE CAUSE OF ACTION IS BAD on demurrer, where the facts alleged constitute only a partial defense to the action. *Id.*
10. OBJECTION THAT PLEA ONLY AMOUNTS TO GENERAL ISSUE can only be taken by a special demurrer. *Hotchkiss v. Ladd*, 679.
11. DUPLICITY. — In proceedings against corporation for usurping banking privileges, replication which avers that defendant issues paper in the similitude of bank notes, and that they were issued with the intent that they should be put in circulation as money, is objectionable for duplicity. *People ex rel. Attorney-General v. River Raisin and Lake Erie R. R. Co.*, 64.
12. PLEA DEFECTIVE AS TENDERING IMMATERIAL ISSUE. — In a proceeding against a railroad corporation for usurping banking privileges by issuing paper in the similitude of bank notes, a plea that defendants have issued certain paper which they describe, and which paper as described may or may not be within the meaning of the law preventing banking by unauthorized persons, is defective, as the issue tendered thereby is immaterial. *Id.*
13. NEW TRIAL ON GROUND OF ERRONEOUS JUDGMENT — REVIEW. — Final judgment was rendered for the defendant upon a special finding of facts by the court in which the case was tried. On the plaintiff's petition in error the reviewing court reversed the judgment, and granted a new trial. *Held*, that the order granting a new trial was proper, and the

- supreme court would not review the evidence. *Merchants' and Manufacturers' Insurance Co. v. Shillito*, 491.
14. NEW TRIAL WILL NOT BE GRANTED when it is seen that the facts cannot be changed, and the fact proved is conclusive of the case. *Brown v. Bowen*, 406.
 15. WHEN CASE IS MADE FOR REVIEW OF BOTH LAW AND FACTS, IT IS NOT NECESSARY THAT CASE SHOULD STATE that it contains all the evidence, as this will be presumed, unless the contrary appears on the face of the case itself. *Gard v. Stevens*, 52.
 16. EXCEPTION SHOULD BE PARTICULAR, where an instruction or conclusion of law is in general correct, but subject, perhaps, to modification in some particulars, not materially affecting its general correctness, so as to call the attention of the court to the precise point of objection. *Knox v. Webster*, 779.
 17. EXCEPTIONS TAKEN BY PREVAILING PARTY, ON TRIAL, ARE NOT AVAILABLE, as a general rule, in the subsequent proceedings, on an appeal from the judgment by the unsuccessful party, where the prevailing party has not also appealed. *Beach v. Cooke*, 260.
 18. PARTY CLAIMING THAT ERROR HAS BEEN COMMITTED UPON TRIAL against his legal rights must make it appear affirmatively upon the record. *Beard v. Murphy*, 693.
 19. WRITTEN NOTICE MUST BE GIVEN TO CUT OFF RIGHT OF APPEAL. The right of a party to appeal from an order of court is not cut off, under the Wisconsin statute, until the expiration of thirty days after the service upon him of a written notice of the making of such order, although he may have had actual knowledge of the order independently of such a notice, and may even himself have drawn it up by his attorney. *Corwith v. State Bank*, 793.
 20. COUNTY COURT MAY, ON APPEAL FROM JUSTICE'S COURT, MODIFY JUDGMENT according to the justice of the case, without regard to technical errors. *Brownell v. Winnie*, 314.
 21. GENERAL TERM OF SUPREME COURT MAY, ON APPEAL FROM SPECIAL TERM, ALTER JUDGMENT of such special term in the interest of justice, neglecting technical errors. *Id.*
 22. COURT OF APPEALS MAY ALTER JUDGMENT, in interest of justice, disregarding technical errors. *Id.*
 23. IF ASSUMPTION IN POINT PRESENTED BY ONE PARTY and affirmed by the court is untrue in fact, the court should be requested by the other to charge upon the true state of facts, or at least upon the latter's hypothesis; and where this is not done, and there is evidence as to the correctness of the assumption, the judgment will not be reversed because of a direction without evidence to sustain it. *Philadelphia etc. R. R. Co. v. Hagan*, 541.
 24. JUDGE MAY REFUSE TO CHARGE UPON EFFECT OF GIVEN STATE OF FACTS when the facts are themselves in dispute. It was therefore not error to refuse to charge the jury that there was no evidence that the accident which was the basis of the action was caused by the sole negligence or want of care of the defendants and their servants, and that the verdict must therefore be in their favor. *Id.*
- See ATTACHMENT, 3-5; CRIMINAL LAW; EQUITY; INSURANCE, 3; JUDGMENTS; PATENTS, 4, 5; SET-OFF; STATUTE OF FRAUDS.

POSSESSION.

See ADVERSE POSSESSION.

POWERS.

1. DIFFERENCE BETWEEN MERE POWER TO CONVEY AND CONVEYANCE ITSELF is that the latter is regarded in law as a contract, while the former is not. *Weisbrod v. Chicago etc. Railway Co.*, 743.
2. PERSON INCAPABLE OF CONTRACTING MAY BE DONEE OF POWER. *Id.*
See HUSBAND AND WIFE, 10, 11.

PROBATE COURTS.

See EXECUTORS AND ADMINISTRATORS; JUDGMENTS, 1.

PROCESS.

1. WANT OF JURISDICTION, EFFECT OF, AS TO OFFICERS WHO EXECUTE PROCESS FAIR ON ITS FACE. — As a general rule, want of jurisdiction renders utterly void the process and proceedings of courts and officers, but third persons whose duty it is to execute such process or to give effect to such proceedings cannot be made trespassers by obeying such process, unless the want of jurisdiction is apparent on the face of such process or proceedings. The person or officer issuing such process, etc., is the one liable. *Porter v. Purdy*, 283.
2. OFFICER WHO EXECUTES PROCESS FAIR ON ITS FACE, BUT ISSUED IN FACT WITHOUT JURISDICTION, IS PROTECTED, because it would be inequitable and unjust to hold him responsible for acts of others over whom he had no control, and for defects of which he had no notice. *Id.*
3. OMISSION OF SEAL OF COURT FROM WRIT MAKES IT IRREGULAR, BUT NOT VOID, and it may be amended by affixing the seal pending a motion to quash. *Jump v. Batton's Creditors*, 146.
4. PARTY IN WHOSE FAVOR PROCESS ISSUES MAY GIVE SUCH INSTRUCTIONS TO SHERIFF as will not only excuse him from his general duty, but bind him to the performance of what is required of him. *Root v. Wagner*, 348.
5. PLAINTIFF IN JUDGMENT, OR HIS ASSIGNEE, MAY DIRECT ALL OR PART THEREOF TO BE MADE OUT OF PROPERTY of any of the defendants, where a judgment has been recovered against several defendants, and execution issued against all; and the sheriff is liable if he refuses to comply with the directions. *Id.*

PUBLIC LANDS.

1. AGREEMENT WITH SETTLER ON PUBLIC LAND, that in consideration of money advanced for the purpose of purchasing it and paying costs and incidental expenses, the lender should have a lien upon the land to secure the repayment thereof, is void, and the settler is not entitled to the benefit of the act concerning pre-emptions, under the provision that "he or she has not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whatsoever, by which the title he or she might acquire from the government of the United States shall inure, in whole or in part, to the benefit of any person except himself or herself." *McCue v. Smith*, 100.
2. PURCHASER OF LAND-WARRANT IN GOOD FAITH AND FOR VALUE CANNOT, AFTER HE HAS LOCATED WARRANT and obtained a patent for the land located, be charged in equity as trustee of the legal title for the true owner of the warrant, although it was obtained by the fraud of a third person, and transferred under a forged assignment. *Dixon v. Caldwell*, 487.

2. **MEASURE OF DAMAGES FOR CONVERSION OF LAND-WARRANT** is its value at the time of the conversion. *Id.*

See **STATUTE OF FRAUDS**, 2.

PUBLIC POLICY.

See **CONTRACTS**, 4.

QUO WARRANTO.

1. **IN INFORMATION IN NATURE OF QUO WARRANTO, FRANCHISES AND PRIVILEGES ALLEGED TO BE USURPED** need only be set forth in general terms. The government has always the right to call upon those who assume corporate powers to require them to show by what warrant they do so, and when the defendants have set forth their claims by plea, the attorney-general may then reply and show the special grounds upon which he relies. *People ex rel. Attorney-General v. River Raisin and Lake Erie R. R. Co.*, 64.
2. **SHOULD NOT CONCLUDE WITH VERIFICATION.** — A plea to an information in the nature of a *quo warranto* which puts in issue a material allegation in the information, such as that any votes were cast for the relator at the election, should conclude to the country, and not with a verification. *People ex rel. Speed v. Hartwell*, 70.
3. **EXPIRATION OF TERM NO GROUND FOR DISMISSAL.** — IN PROCEEDINGS IN NATURE OF QUO WARRANTO against respondent for having intruded into an office, the information will not be dismissed, even though it appears that the office which respondent is charged to have usurped has expired since the filing of the information, as the statute provides for the imposition of a fine in a proper case, and also for the payment of costs by the respondent and the recovery of damages by the relator. *Id.*
4. **WHERE LEAVE OF COURT MUST FIRST BE OBTAINED TO FILE INFORMATION IN NATURE OF QUO WARRANTO**, the court may, in its discretion, refuse its permission on the ground that the term of office would expire before the question could be tried; but where the statute permits the information to be filed without permission, this is no objection to the prosecution of the proceedings. *Id.*

See **PLEADING AND PRACTICE**, 12.

RAILROADS.

1. **RAILROAD COMPANY MAY ASSUME DOUBLE CHARACTER OF CARRIER AND WAREHOUSEMAN.** *Wood v. Crocker*, 773.
2. **STATUTORY REQUIREMENT THAT BELL ON LOCOMOTIVE ENGINE BE RUNG, OR WHISTLE BLOWN, for a specified distance at crossings**, imposes a duty upon railroad companies, not only in reference to persons approaching or in the act of passing the crossing, but in reference to all persons who, being lawfully at or in the vicinity of the crossing, may be subjected to accident and injury by the passing train. *Wabashfield v. Connecticut etc. R. R. Co.*, 711.
3. **IN CASE OF OMISSION TO GIVE SIGNAL AT CROSSINGS, AS REQUIRED BY STATUTE**, and damage ensues in consequence, the railroad company must show that the omission was reasonable and prudent. *Id.*
4. **IT IS DUTY OF RAILROAD COMPANY TO KEEP ITS CATTLE-GUARDS OPEN.** *Dunnigan v. Chicago etc. R'y Co.*, 741.

5. **RAILROAD COMPANY IS GUILTY OF NEGLIGENCE IN PERMITTING ITS CATTLE-GUARDS TO REMAIN FILLED WITH SNOW**, so that cattle, which have escaped upon a highway without their owner's negligence, may pass onto the track and be liable to be killed. If any injury is thereby sustained, the company is liable for the damages, and the jury may be so instructed. *Id.*
 6. **RULES OF RAILROAD COMPANY REGULATING DISTANCE AT WHICH TRAINS SHALL RUN** from each other are intended solely for the protection of the property of the company, and the safety of their employees and passengers, and not for persons who may be traveling along the highway; and no inference of negligence can be drawn from the proximity of trains, in an action to recover damages for an injury done to a person while crossing the railroad track at a place not known or used as a public crossing. *Philadelphia etc. R. R. Co. v. Spearen*, 544.
 7. **RAILROAD COMPANY IS NOT ANSWERABLE IN DAMAGES** for injury to five-year-old child, resulting from being struck by one of the company's engines while attempting to cross the track between such engine and a coal train which was running ahead of it, unless there is proof of want of ordinary care in the engineer at the time when and place where the injury occurred. *Id.*
 8. **TRAIN SHOULD APPROACH CROSSING OF PUBLIC STREET** at moderate rate of speed, and should give timely warning, by whistle or other usual notice, of approach of train, to those lawfully passing along the street; and if by neglect or omission that duty is not fulfilled, the railroad company is liable for injury or death resulting therefrom, unless it be affirmatively shown that ordinary care was not taken by the party injured to avoid the accident. *Id.*
 9. **TOWN LOTS HELD BY RAILROAD COMPANY DO NOT PASS BY SHERIFF'S SALE** under mortgage of the road, "with its corporate privileges and appurtenances," unless directly appurtenant to the railroad and indispensably necessary to the enjoyment of its franchises; and the question of appurtenancy and necessity is properly referred to the jury as a fact to be determined by them. *Shamokin Valley R. R. Co. v. Livermore*, 552.
- See **COMMON CARRIERS**, 17; **CORPORATIONS**, 7; **EMINENT DOMAIN**; **HIGHWAYS**, 3; **NUIRANCE**, 2.

RAPE

See **SEDUCTION**, 1.

RECEIVERS.

SUPREME COURT HAS JURISDICTION, BY STATUTE, TO APPOINT RECEIVERS in cases of insolvent corporations; and when an order is made appointing such an officer, the presumption is, that all things were done required by the statute to be done, in order to authorize it to make such order. *Potter v. Merchants' Bank*, 273.

REFEREES.

NEW TRIAL SHOULD BE GRANTED FOR ANY MATERIAL ERROR OCCURRING ON TRIAL BEFORE REFEREE, or in the findings of fact by him; but where the only error appearing is in the judgment which the referee directs to be entered on the facts found, the court may correct it by rendering the appropriate judgment. *Beach v. Cooke*, 260.

RIPARIAN RIGHTS.

1. **MILL-OWNERS ARE ENTITLED TO RECOVER DAMAGES FOR INJURY CAUSED BY ERECTION OF DAM BELOW** by riparian proprietors, setting back water upon the wheels of the mills, where such mill-owners were at the time in the actual use and occupation of the premises upon which the mills were located, and they and those under whom they claimed had been in possession thereof a number of years prior to the erection of the dam. *Brown v. Bowen*, 406.
2. **EACH RIPARIAN PROPRIETOR HAS RIGHT TO USE WATERS OF STREAM ON HIS OWN PREMISES** for any purpose for which it may be legitimately used, and no one has the right by any erection on his own premises to interfere with such enjoyment to the prejudice of another; although, it seems, where proprietors draw water from the same dam, each has the right to continue to use the water, whatever may be the effect on another, unless the latter has acquired by grant or prescription the right to an exclusive use, or to use whenever there is not water enough for both. *Id.*
3. **OCCUPANT OF PREMISES INJURED BY SETTING BACK WATER THEREON IS ENTITLED TO RECOVER DAMAGES** against the wrong-doer to an amount sufficient to indemnify him for the injury to such interest as he had in the premises. *Id.*
4. **ALLEGATION THAT PLAINTIFFS ARE JOINT OWNERS OF MILLS MUST BE PROVED**, in an action to recover damages for an injury sustained by them from setting back water by means of a dam erected below. *Id.*
5. **POSSESSION OF PREMISES BY PLAINTIFFS WILL BE PRESUMED TO BE LAWFUL**, entitling them to recover damages for an injury sustained by them from setting back water by means of a dam erected below by the defendants, where both parties asserted title at the time to the premises, but the defendants occupied the premises adjoining, and never previously made claim to the premises occupied by the plaintiffs. *Id.*
6. **EVIDENCE, ALTHOUGH LOOSE, IS SUFFICIENT ON WHICH TO REST ESTOPPEL**, where the plaintiffs in an action to recover damages for an injury sustained by them from setting back water by means of a dam erected below, showed that the defendants' ancestor, under whom the defendants claimed, was present when one of the plaintiffs purchased the premises, and that he did not claim that he owned the land, but said that he had come to buy it. *Id.*
7. **JOINT ACTION ONLY CAN BE MAINTAINED TO RECOVER DAMAGES FOR INJURY SUSTAINED BY SETTING BACK WATER** by means of a dam erected below, where the plaintiffs were in partnership prior to and at the time when the dam was built. *Id.*
8. **ACTION CAN BE MAINTAINED TO RECOVER DAMAGES FOR INJURY SUSTAINED BY SETTING BACK WATER** by means of a dam erected below, where the plaintiffs consented to the building of the dam, but the consent was given on the condition that the work should be so done as not to injure the plaintiffs, and the work was so imperfectly done that the current of the stream was impeded, and the water did not flow off, but set back on the plaintiffs' wheels. *Id.*
9. **ESTOPPEL IS CONSTITUTED BY DEFENDANTS' OMISSION TO ASSERT TITLE**, where, in an action to recover damages for an injury sustained by setting back water by means of a dam erected below, it was shown that the defendants and their ancestor had omitted to assert title to the premises in question, although knowing the premises to belong to them, and that the

plaintiffs had purchased the premises and were making valuable permanent improvements thereon in the belief that they owned them. *Id.*

See WATERCOURSES.

SALES.

1. IN EXECUTORY CONTRACT FOR SALE OF PERSONAL PROPERTY, law implies that the article when furnished shall be of merchantable quality, and this without express words between the parties. *Reed v. Randall*, 305.
2. TOBACCO IS NOT MERCHANTABLE where it is not well cured and in good condition when it is delivered, but is wet, sweaty, and rotten. *Id.*
3. SUPERADDING TO TERMS OF CONTRACT WORDS EXPRESSING OBLIGATION WHICH LAW IMPLIES does not change the nature or extent of the obligation or the remedy upon it. *Id.*
4. BREACH OF CONTRACT TO FURNISH IN FUTURE MERCHANTABLE CROP OF TOBACCO, by delivering tobacco that is wet, sweaty, and rotten, is not a breach of warranty, but a mere non-compliance with such executory contract. *Id.*
5. UNLESS VENDEE GIVES NOTICE OR OFFERS TO RETURN PERSONAL PROPERTY, his remedy to recover damages on the ground that the article furnished does not correspond with the contract, where it is executory, does not survive his acceptance of the property after opportunity to ascertain the defect. *Id.*
6. RETENTION OF PROPERTY DELIVERED UNDER EXECUTORY CONTRACT is an admission that the contract has been performed. *Id.*
7. VENDEE IS NOT BOUND TO RECEIVE AND PAY FOR PROPERTY THAT HE HAS NOT AGREED TO PURCHASE; but if after delivery it is found on examination to be unsound, or not to answer the order given for it, he must immediately return it to the vendor, or give him notice to take it back, or he will be presumed to have acquiesced in its quality. *Id.*
8. VENDEE CANNOT ACCEPT DELIVERY OF PROPERTY UNDER EXECUTORY CONTRACT, retain it after having had an opportunity of ascertaining its quality, and recover damages if it be not of the quality or description called for by the contract. *Id.*
9. PART DELIVERY. — IF VENDEE, ON RECEIVING PART OF QUANTITY OF GOODS SOLD, finds they are not of the kind or quality which his contract entitles him to, he is not at liberty to retain such part, and claim damages for the non-delivery of the entire quantity. Nor can he require the delivery of the residue, retaining a claim for damages. He must either receive the article as it is, or he must return the portion delivered, and then enforce his claim for damages. He can recover no damages if he refuse to return the part delivered. *Id.*
10. VENDEE, HAVING WITHOUT PROTEST ACCEPTED TOBACCO BOUGHT UNDER EXECUTORY CONTRACT, cannot, after waiting for more than a year and a half after its delivery, maintain an action to recover damages on the ground that the tobacco was in a bad condition when delivered, not having been properly cured, and being wet, sweaty, and rotten. *Id.*
11. FACT THAT HORSE PROVED TO BE "BALKY" ON TRIAL, three or four days after purchase, is evidence that he was "balky" at the time of purchase, for the purpose of establishing a breach of warranty of soundness and gentleness. *Finley v. Quirk*, 93.
12. ACTION OF COURT WHERE THERE IS NO ORDER OR OPERATIVE RULING is not ground for exception. So held where on motion of a respondent to AM. DEC. VOL. LXXXVI—54

- require sureties in an appeal bond to justify, the court had ruled that if the respondent would make affidavit that the surety was insufficient, it would require him to justify, or the appellant to furnish another surety, and the latter had excepted to the ruling, at the same time furnishing another surety. *Id.*
13. IN ACTION FOR BREACH OF WARRANTY OF HORSE, VALUE OF HORSE cannot be proved by evidence that since the commencement of the action a good and responsible party offered a certain sum for him, which sum was refused. *Id.*
14. SALE CONSUMMATED ON SABBATH IS VOID, and an action of warranty in such sale will not lie. *Id.*
15. DENIAL OF SALE OF HORSE RAISES ISSUE ONLY ON SALE IN POINT OF FACT, and not on the legality of such sale. *Id.*
16. FACTS TENDING TO ESTABLISH DEFENSE THAT SALE WAS MADE ON SUNDAY, and is therefore void, constitute new matter by way of defense, and must be pleaded affirmatively. *Id.*

SCIRE FACIAS.

See WRITS.

SEDUCTION.

1. IN ACTIONS FOR SEDUCTION, AND ON TRIALS FOR RAPE, DEFENDANT IS ALWAYS PERMITTED TO PROVE that the general character of the servant or prosecutrix for chastity is bad; and this must be done by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity. *Watry v. Ferber*, 789.
2. SAME — INNOVATIONS UPON GENERAL RULE. — Character of the prosecutrix for chastity may be impeached, not only by general evidence of her reputation in this respect, but she may be asked whether she has not had previous criminal connection with the accused; and if she is examined as a witness for the prosecution, she may be inquired of, on cross-examination, whether she had not, at certain specified times and places, had sexual intercourse with other persons besides the accused. These questions go to repelling the allegation of force. *Id.*
3. IN ACTION FOR SEDUCTION, THOUGH FEMALE CANNOT BE INTERROGATED HERSELF as to acts of unchastity with others, yet third persons may be called to testify to their own criminal intercourse with her, and the time and place. *Id.*
4. EVIDENCE AS TO PRIOR ACTS OF UNCHASTITY WITH OTHERS ADMISSIBLE IN CIVIL ACTION OF TRESPASS, WHEN. — Where the plaintiff in an action for an assault has alleged, as a matter of aggravation, that the defendant had connection with her against her will, the defendant has a right to show that the plaintiff has been previously criminal with other persons, as a circumstance tending to repel the allegation of force. *Id.*

SERVITUDES.

SERVITUDES ADOPTED BY OWNER OF LAND, which are of a permanent nature, notorious or plainly visible, and from the character of which it may be presumed that he intended their preservation as evidently necessary to the convenient enjoyment of the property to which they belong, become, when the lands are divided and pass into other hands, permanent appurtenances thereto, and neither the owner of the dominant or of the ser-

vient portion of the land has any right to interfere with their proper use and enjoyment. *Phillips v. Phillips*, 577.

See EASEMENTS.

SET-OFF.

1. **SET-OFF MAY BE BARRED BY LIMITATION.** The statute applies as well to a sum attempted to be set off as to one upon which an action is to be brought. *Nolin v. Blackwell*, 206.
2. **STATUTE OF LIMITATION—SET-OFF—ABSENCE FROM STATE.**—Where the plaintiff resided out of the state when the claim constituting defendant's set-off accrued, and up to the time he commenced his action here, and the defendant became a resident of the state within six years after it accrued, and continued to reside here until the action was commenced, that portion of the statute which provides that the time during which a person against whom a claim is due shall not reside in the state shall not be included in the period of limitation, saves defendant's set-off from the bar of the statute. *Id.*

SHERIFFS.

1. **EQUITY WILL NOT COMPEL SHERIFF**, who has sold land under execution, to execute a deed to the purchaser, who offers and has always been ready to pay the purchase-money. To compel the execution of a deed in such case is the exclusive function of the court under whose authority the sheriff acted in making the sale. *Patrick v. Carr*, 454.
2. **ACTS OF DEPUTY ARE NOT TO BE REGARDED AS ACTS OF SHERIFF**, in the sense of either agency or identity, but rather in the sense of official relation and of responsibility cast by law upon the sheriff for the acts of his deputy; that is, for what the deputy does, the sheriff is made responsible the same as if he had officially done the same thing. *Flanagan v. Hoyt*, 675.
3. **RECEPTOR'S LIABILITY TO SHERIFF FOR PROPERTY TAKEN AND SOLD BY DEPUTY.**—Property attached by a sheriff, and receipted, and left by the receptor in the defendant's possession, was, before judgment, levied upon and sold by the deputy on an execution against the defendant, without the knowledge or consent of the sheriff. *Held*, that upon judgment being recovered in the first suit and execution issued, the receptor was liable to the sheriff in an action for the property. *Id.*
4. **RETURN OF SHERIFF IS PRIMARY EVIDENCE OF HIS ACTION**, and as a general rule, in the absence of fraud or mistake it cannot be varied or contradicted by his parol testimony. *Ayres v. Duprey*, 657.

See EXECUTIONS.

SHIPPING.

1. **MASTER OF VESSEL IS FOR MOST PURPOSES AGENT OF OWNERS OF SHIP AND CARGO**; but that agency does not extend to a sale of either, unless there is a necessity at the time for so doing. *Butler v. Murray*, 355.
2. **TO JUSTIFY SALE OF CARGO BY MASTER AT INTERMEDIATE PORT**, there must be a necessity for it, arising either from the nature or condition of the property, or from the inability to complete the voyage by the same ship, or to procure another; the master must have acted in good faith; and he must, if practicable, consult with the owner before selling. *Id.*

3. **ADVICE OF PERSONS CALLED BY MASTER TO EXAMINE CARGO IS NOT CONCLUSIVE AS TO NECESSITY OF SALE**, but should be taken into consideration by the jury in determining the question, and is entitled to very considerable weight, where the master, at an intermediate port, found his cargo of hides to be in a bad and perishing condition, and summoned three dealers in and shippers of hides, to examine the hides and declare what it was proper for him to do under the circumstances, who, in good faith, advised a sale, and the hides were sold accordingly. *Id.*
4. **QUESTION AS TO NECESSITY OF SALE OF CARGO BY MASTER SHOULD BE SUBMITTED TO JURY**, if a doubt exists, on the facts, as to the necessity. *Id.*
5. **JETTISONED GOODS STOWED ON DECK OF STEAMER NAVIGATING LONG ISLAND SOUND ARE ENTITLED TO BENEFIT OF GENERAL AVERAGE**, especially if it is the usage to stow goods on deck. *Harris v. Moody*, 375.
6. **ALL PROPERTY ON BOARD VESSEL AT TIME OF JETTISON IS LIABLE TO CONTRIBUTION**, except that attached to the persons of the passengers. *Id.*
7. **BANK BILLS ON BOARD STEAMER, FOR TRANSPORTATION, AT TIME OF JETTISON, ARE PROPERTY**, liable to contribute to the general average loss, although they are carried in a crate for the owners by an express company, which by agreement pays the owners of the steamer a fixed sum annually for carrying a certain number of crates with their contents. *Id.*

See INSURANCE, 15, 16; MARITIME LAW.

SPECIFIC PERFORMANCE.

1. **PARTY SEEKING SPECIFIC PERFORMANCE OF CONTRACT IN WHICH HE HAS NO PRIVITY** must make all those through whom he claims the right of enforcing the contract parties to his suit. *Allison v. Skilling*, 622.
2. **WHERE ONE HAS MADE HIS TITLE BOND TO ANOTHER, who assigns it to another, who executes his own title bond to another, who makes his title bond to the plaintiff, the latter, in a suit against the first vendor for specific performance of his contract, must join all the others as parties.** *Id.*
3. **BOND OF HUSBAND TO CONVEY AT FUTURE DAY TRACT OF LAND** then the homestead of himself and wife is not an unlawful undertaking, although a specific performance of the bond cannot be decreed while the premises remain a homestead. *Id.*

STATUTE OF FRAUDS.

1. **DEFENSE OF STATUTE OF FRAUDS MAY BE SHOWN UNDER GENERAL ISSUE**, or pleaded specially, at the option of the defendant. *Hotchkiss v. Ladd*, 679.
2. **TO PLEA OF STATUTE OF FRAUDS ALLEGING THAT PROMISES MENTIONED WERE SPECIAL PROMISES** to pay the debt of a person named, a replication denying that the promises were for the debt of such person is a good answer, without the words, or any other person. The traverse is as broad as the issue offered. *Id.*
3. **VERBAL AGREEMENT WITH SETTLER ON PUBLIC LAND**, that in consideration of money advanced for the purpose of purchasing it and paying costs and incidental expenses, the lender should have a lien upon the land to secure the repayment thereof, and that the terms of the agreement and

charge on the premises should be evidenced by a note and mortgage or other memorandum in writing, as the parties might be advised when the transaction should be consummated, is void under the statute of frauds. *McCue v. Smith*, 100.

4. IF CONTRACT, WHICH WAS WITHIN STATUTE OF FRAUDS when made, and might have been avoided thereby, has been fully executed, the statute furnishes no defense. *Id.*
5. SALE OF GROWING TREES, WITH RIGHT TO ENTER ON LAND AND REMOVE THEM AT ANY FUTURE TIME, CONVEYS INTEREST IN LANDS within the meaning of the statute of frauds. *Kingsley v. Holbrook*, 173.
6. SALE OF GROWING ANNUAL CROPS IS SALE OF CHATTELS, it seems, within the meaning of the statute of frauds. *Id.*
7. DECLARATION IS NOT DEMURRABLE FOR NOT ALLEGING CONTRACT TO BE IN WRITING, if the facts alleged show a contract that would be binding if evidenced by a writing. *Hotchkiss v. Ladd*, 679.

STATUTE OF LIMITATIONS.

See SET-OFF.

SUNDAY.

See COMMON CARRIERS, 16; CONTRACTS, 6; SALES, 14, 16.

SURETYSHIP.

See DEB. OR AND CREDITOR, 2; GUARANTY.

TAXATION.

See CONSTITUTIONAL LAW, 9-13.

TORTS.

ONE MAY PREVENT IN PEACEABLE WAY WRONGFUL VIOLATIONS OF HIS RIGHTS by another, and may use the necessary means to that end, although such means may work incidental harm to the wrong-doer. *Berd v. Murphy*, 693.

See HUSBAND AND WIFE, 7-9.

TRESPASS.

1. DEFENDANT IN TRESPASS TO TRY TITLE, IF HE CAN HAVE IN THAT ACTION EQUITABLE RIGHT, as against plaintiff, to avoid sheriff's deed for irregularities in the sale, cannot have this relief under plea of not guilty, but must plead specially, bringing in all necessary parties. *Ayres v. Duprey*, 657.
2. PLEA OF NOT GUILTY IN ACTION OF TRESPASS TO TRY TITLE admits only such defenses as are applicable to that action. *Id.*
3. EVIDENCE OF PRIOR THREATS, ETC., IS ADMISSIBLE IN MITIGATION OF DAMAGES IN ACTION FOR TRESPASS TO PERSON. Where such trespass was committed in an affray, the defendant may show, in mitigation of damages, that the plaintiff, during several years before the affray, had frequently tried to provoke a quarrel with him; had on various occasions threatened to take his life; that some of these threats were made to defendant himself; and that all of them had been brought to his knowledge before the affray. *Fairbanks v. Witter*, 765.

TROVER.

See ATTACHMENT, 2; CO-TENANCY.

TRUSTS.

1. **ACTIVE OPERATIVE TRUST IS CREATED AND ESTATE VESTED IN TRUSTEES** by devise of real and personal property, in trust, to lease and let the real estate, to keep the personal estate invested on bond and mortgage, or other safe security, to collect and receive the rents, interest, and profits thereof, and to pay over the net income to the children of the testator; the uses not being such as are executed by the statute of uses, nor by the common law of Pennsylvania. *Barnett's Appeal*, 502.
2. **TRUST RESTRICTED TO LIVES IN BEING AT DEATH OF TESTATOR**, or to the survivor of them, does not infringe the rule against perpetuities. *Id.*
3. **LAW CONCERNING ACTIVE TRUSTS** discussed. *Id.*
4. **TRUSTS IN LAND, CREATED IN FAVOR OF INSOLVENT**, either with or without full consideration, may, in the absence of fraud, be enforced in equity by the beneficiary against the trustee. *Baker v. Evans*, 456.
5. **ACTIVE TRUST IS CREATED AND ESTATE VESTED IN TRUSTEES** by devise of real and personal estate in trust "to collect and receive the rents, issues, interest, and income therefrom," and after deducting expenses, "to pay over the same into the *cestui que trust* for his own use and benefit, or to such person as by his order in writing he may authorize to receive the same," and upon his decease to assign, transfer, and convey the said estate so held as he by his last will shall appoint, and in default of appointment, to such person or persons, for such estates and in such shares, as would be entitled to the same had he died seized thereof intestate; but the income for life under such a devise becomes the absolute property of the *cestui que trust*, and therefore attachable by his creditors; and could only be secured to the *cestui que trust* by provisions in the will against alienation and liability for debts. *Girard Life Ins. Co. v. Chambers*, 513.

USAGE.

See INSURANCE, 16.

USURY.

PROMISSORY NOTE IS CONTROLLED, AS TO DEFENSE OF USURY, BY LAWS OF STATE where it is made, dated, and payable, and not by the laws of the state where it is negotiated. *Jewell v. Wright*, 372.

VENDOR AND VENDEE.

1. **PURCHASER OF FEE-SIMPLE IS ONLY ENTITLED TO COVENANT AGAINST ACTS OF GRANTOR** and his heirs, that is, a covenant of special warranty. *Lloyd v. Farrell*, 563.
2. **PAROL EVIDENCE TENDING TO PROVE UNDERTAKING BY VENDEE TO TAKE LAND AT HIS OWN RISK** should not be submitted to the jury in an action on a bond for the purchase-money, the title having proved defective, where the agreement for the purchase expressly negatived such an undertaking, and the deed subsequently taken contained all the covenant that the purchaser of a perfect title could claim. *Id.*
3. **WHERE VENDOR AGREES TO CONVEY LAND IN FEE-SIMPLE CLEAR OF ALL ENCUMBRANCES**, parol evidence that at the time of the execution of the agreement it was understood that the vendee should, at his own risk,

take whatever title the vendor had, is inadmissible to contradict the written instrument, and incompetent to destroy its covenants. And even if such evidence were admissible to reform the written agreement, it could have no bearing upon the deed of the land subsequently executed. *Id.*

4. **VENDOR HAVING KNOWLEDGE OF DEFECT IN HIS TITLE CANNOT BIND HIS VENDEE**, ignorant of the facts, by an agreement to assume all the risk of the title; the concealment of the facts in such a case is a constructive fraud. *Id.*
5. **DEFECT IN TITLE OF GRANTOR OF LAND HOLDING PERFECT LEGAL TITLE**, subject, however, to a trust as to two undivided third parts thereof to other persons, is not covered by the statutory covenant contained in the words "grant, bargain, and sell" of a deed, or by the express covenant of special warranty therein. *Id.*
6. **VENDOR'S REPRESENTATIONS OF VALUE AMOUNT TO WARRANTY, WHEN.** — A representation made by the vendor at the time of sale, respecting the quality of the thing sold, amounts to a warranty if such representation is relied upon by the vendee. *Hahn v. Doolittle*, 757.
7. **VENDOR OF NOTE AND MORTGAGE IS LIABLE TO PURCHASER, WHEN.** — Where the thing sold is a note and mortgage, the maker of which is known by both parties to be insolvent, and the vendor represents the mortgage to be good, as an inducement for the vendee to buy, and the latter, relying upon such representation, does buy, the vendor is liable to the purchaser for the consideration paid, if it turns out that mortgagor has in fact no title to the mortgaged premises. *Id.*
8. **VENDEE CANNOT RESCIND CONTRACT INDUCED BY FRAUD, AFTER DISPOSING OF PROPERTY**, by offering to restore what he received for it, although he disposed of the property before the discovery of the fraud. His remedy is an action for damages, or a reduction from the contract price to the same extent, if that is yet unpaid. *McCrillis v. Carlton*, 700.
9. **VENDEE OF LAND WHO PURCHASES WITH KNOWLEDGE OF EXISTING RIGHT OF WAY** over it is bound to perform his engagement to pay the purchase-money, when the state of facts continues to be the same as it was at the date of the purchase. *Wilson v. Cochran*, 574.
10. **EQUITABLE LIEN FOR PURCHASE-MONEY OF LAND IS NOT CREATED BY MERE RECITAL** on the face of the deed that the purchase-money remains unpaid and is to be paid annually. And where no intention to charge the purchase-money as a lien on the land is expressed in the deed, the law will not imply such an intention, and no lien is created as against a purchaser thereof at sheriff's sale as the property of the grantee. *Hiester v. Green*, 569.

See **BONA FIDE PURCHASERS**; **CONTRACTS**, 5; **COVENANTS**; **DEEDS**.

WAREHOUSEMEN.

See **RAILROADS**, 1.

WARRANTY.

See **CONTRACTS**, 3; **SALES**; **VENDOR AND VENDEE**; **WITNESSES**, 6.

WATERCOURSES.

1. **OWNER OF LAND THROUGH WHICH STREAM FLOWS MAY INCREASE VOLUME OF WATER** by draining into it, without any liability for damages to a lower owner. *Miller v. Laubach*, 521.

2. OWNER OF LAND CANNOT, BY ARTIFICIAL CHANNEL, DRAIN WATER standing upon his own land onto that of another. *Id.*
3. OWNER OF LAND MAY ERECT OBSTRUCTION THEREON TO PREVENT INFLUX OF FOUL WATER from adjoining premises wrongfully permitted by the owner of the latter, even if it results in turning back the surface water which flows naturally from such premises. *Beard v. Murphy*, 693.
4. RAIN-WATER — THERE IS NO SUCH THING AS RIGHT TO ANY PARTICULAR FLOW OF SURFACE WATER JURE NATURÆ. — The owner of land may, at his pleasure, withhold the water flowing on his property from passing in its natural course onto that of his neighbor, and in the same manner may prevent the water falling on the land of the latter from coming on his own. *Bowlsby v. Speer*, 216.
5. DIVERTING RAIN-WATER UPON LANDS OF PLAINTIFF. — Where the rain-water which fell upon the lands of defendant, and into and upon a certain pond above his place, fed exclusively by rain-water, was accustomed to flow through a kind of channel over defendant's land, and away from plaintiff's, and defendant erects a stable over this channel, by which a part of this flow of surface water was diverted upon the lands of plaintiff, the injury is not actionable; it is *damnum absque injuria*. *Id.*

See RIPARIAN RIGHTS.

WAYS.

See EASEMENTS; HIGHWAYS; VENDOR AND VENDEE, 2.

WILLS.

1. GENERAL BEQUEST OF PERSONAL PROPERTY TO ONE PERSON FOR LIFE, WITH REMAINDER OVER, REQUIRES so much of the property as is of a perishable nature to be converted into permanent securities for the benefit of the remainderman, giving the tenant for life the income arising therefrom; unless some expression of intention that the property is to be enjoyed *in specie* can be gathered from the will. *Healey v. Toppan*, 159.
2. SPECIFIC BEQUEST OF PERSONAL PROPERTY TO ONE PERSON FOR LIFE, WITH REMAINDER OVER, IS ABSOLUTE GIFT to the tenant for life where the property is of such a nature that it perishes in the using; but if the tenant should die before it is consumed, whatever remains will go to the remainderman, and not to the representatives of the tenant. *Id.*
3. SPECIFIC BEQUEST OF PERSONAL PROPERTY TO ONE PERSON FOR LIFE, WITH REMAINDER OVER, ENTITLES TENANT TO ITS POSSESSION AND USE during his lifetime, and the remainderman to the property thereafter, where the property is of such a nature that it is not consumed, but only deteriorates or wears out by use; and the tenant is not required to give security to the remainderman, but only to file an inventory for his benefit; although the remainderman may have security when it is shown that there is real danger that the property will be wantonly wasted or fraudulently secreted or removed. *Id.*
4. RESIDUARY BEQUEST, IF GIVEN "SUBJECT TO" PAYMENT OF ANNUITY TO ANOTHER FOR LIFE, IS CHARGED with the annuity; and before the property is delivered to the legatee, the executors should set apart an amount sufficient to meet the annuity from the income. *Id.*
5. BEQUEST OF REAL ESTATE FOR LIFE, WITH REMAINDER OVER, IS ALWAYS TO BE TREATED AS SPECIFIC DEVISE, of which the tenant for life is to have the possession, use, and income during life. *Id.*

6. BEQUEST OF PERSONAL PROPERTY WILL NOT BE HELD SPECIFIC merely because it is combined with a devise of land. *Id.*
7. SHIPPING, INCLUDED IN GENERAL RESIDUARY BEQUEST TO ONE FOR LIFE, WITH REMAINDER OVER, SHOULD BE CONVERTED into money, and together with the profits of the shipping arising during the settlement of the estate, after paying the tenant for life a proper amount of interest on the sum, should be invested by the executors in permanent securities, for the benefit of the remainderman, giving the tenant for life the income arising therefrom. *Id.*
8. GENERAL BEQUEST OF PERSONAL PROPERTY TO ONE PERSON FOR LIFE, WITH REMAINDER OVER, ENTITLES TENANT FOR LIFE TO SUCH INCOME on the clear principal, during the process of administration, from the death of the testator, where no time for the commencement of the enjoyment of the income is prescribed, as will make it worth the same to him annually that it will be worth to the remainderman. In this case, five per cent allowed. *Id.*
9. DEVISE OF LAND OPERATES AS CONVEYANCE. Upon the death of the devisor the land passes directly to the devisee, and the executor takes no estate or interest in it. *Patton v. Patton*, 448.
10. LANDS DEVISED SPECIFICALLY TO WIFE AND CHILDREN do not come within the operation of a residuary clause in a will providing that certain tracts of land shall pass to the executor in trust to be sold, and the proceeds divided between the wife and children, and directing the executor "to keep my estate together, and not to hand over any of the devises or legacies" until the happening of a certain event. As to the land specifically devised, the words "not to hand over" have no application whatever. *Id.*
11. ORDER OF INTRODUCTION OF EVIDENCE IN CONTESTING WILL. — In a suit to contest the validity of a will, the contestants offered in evidence the alleged will, with the order of the court admitting it to probate, and rested their case. The contestant then concluded his testimony impeaching the validity of the will, after which the contestants were permitted to introduce general evidence against the objection of the contestant, sustaining the will. *Held*, that the evidence was properly admitted. *Rumson v. Price*, 458.
12. OPINION OF WITNESS AS TO SANITY OF TESTATOR must relate to the time of his examination, and his opinion at a period anterior cannot be called for upon the direct examination. *Id.*
13. WITNESS CANNOT BE ASKED HIS OPINION AS TO CAPACITY OF TESTATOR to make a will. Such inquiry involves a matter of law, and also assumes that the witness knows the degree of capacity required to perform the act in issue. *Id.*

See EXECUTORS AND ADMINISTRATORS.

WITNESSES.

1. WITNESS IS INCOMPETENT TO TESTIFY AS TO CHARACTER OF ANOTHER WITNESS for truth and veracity when his belief is based upon his individual opinions and feelings, and not upon his knowledge of the reputation of the witness for veracity in the community in which he lives. *Ayres v. De-prey*, 657.
2. TESTIMONY OF WITNESS CANNOT BE CONTRADICTIONED BY PROOF OF INCONSISTENT DECLARATIONS and statements, without first laying a predicate for

- so doing by inquiring of him as to the alleged statements, and thus affording him an opportunity of meeting or explaining them. *Id.*
3. **INQUIRY, ON IMPEACHMENT OF WITNESS, SHOULD BE CONFINED TO HIS GENERAL CHARACTER FOR TRUTH,** and should not extend to his general moral character. *Id.*
 4. **WITNESS MUST BE INTERROGATED AS TO STATEMENTS MADE BY HIM OUT OF COURT** before such statements can be given in evidence to impeach the witness; and this rule is not affected by the fact that the opportunity for such examination has been cut off by the death of the witness. *Rumy v. Price*, 458.
 5. **WITNESS MAY USE MEMORANDUM NOT MADE BY HERSELF** to refresh her memory, if, after seeing the memorandum, she is able to recall the facts and testify to them as matters of recollection. *Hill v. State*, 738.
 6. **COVENANTOR IN WARRANTY WHICH DOES NOT RUN WITH LAND IS COMPETENT WITNESS** without release in favor of grantee of the covenantor's grantee against an adverse claimant; and if the covenant does run with the land, or if the plaintiff has an equitable right to enforce it, a proper release will render the covenantor a competent witness in behalf of the plaintiff. *Ayres v. Duprey*, 657.
 7. **WHERE WITNESS HAS SWORN DIFFERENTLY UPON SAME POINT ON FORMER OCCASION,** his testimony should remain in the case, to be considered by the jury in connection with the other evidence, under such prudential instructions as may be given by the court, and subject to the determination of the court having jurisdiction to grant new trials in cases of verdicts against evidence. The judge is not to pronounce the witness incompetent, and order his testimony stricken out and wholly excluded from consideration as though he had been convicted of a crime rendering him incompetent to testify as a witness. *Dunn v. People*, 319.
 8. **SELF-CONTRADICTION BY WITNESS OF EVIDENCE IN FORMER TRIAL GOES TO DISCREDIT HIM,** but the jury may consider his evidence for what they think it is worth. *Id.*
- See **ATTORNEY AND CLIENT**, 4, 5; **CRIMINAL LAW**, 6-8; **DEPOSITIONS**; **EVIDENCE**; **MORTGAGES**, 3; **WILLS**, 12, 13.

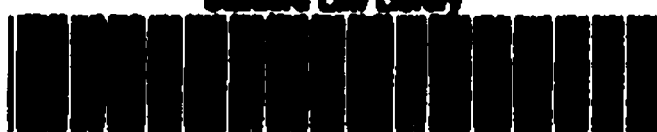
WRITS.

1. **SCIRE FACIAS WILL LIE TO RECOVER FOR NEWLY DISCOVERED BREACH OF AGENT'S BOND, WHICH HAD PASSED INTO JUDGMENT,** where the bond was given by the agent to secure his accounting and payment of sums collected by him to an insurance company in whose employ he was. The company had no means of discovering that the agent had received the money at the time of the rendition of the former judgment; and the fraudulent concealment, upon its discovery, constituted a new breach, and such concealment is a sufficient reason for not including the sum in the original pleading and judgment. *Johnson v. Provincial Ins. Co.*, 49.
2. **WRIT IS PROPERLY SAID TO RUN IN NAME OF PERSON OR GOVERNMENT** from whom the command on the face of the writ appears to emanate. *Id.*
3. **OBJECTION TO WRIT, THAT IT IS NOT TESTED IN NAME OF PEOPLE, WILL NOT BE ALLOWED** as an objection that the style of the writ was not in the name of the people, or that it did not run in their name. The courts will not permit the amendment of an objection which is purely technical, and which, as amended, would tend to overthrow substantial justice. *Id.*

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